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June 30

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK.

BY
SAMUEL JONES AND JAMES C. SPENCER,
REPORTERS OF THE COURT.

NEW YORK SUPERIOR COURT REPORTS,
VOL. XLV.

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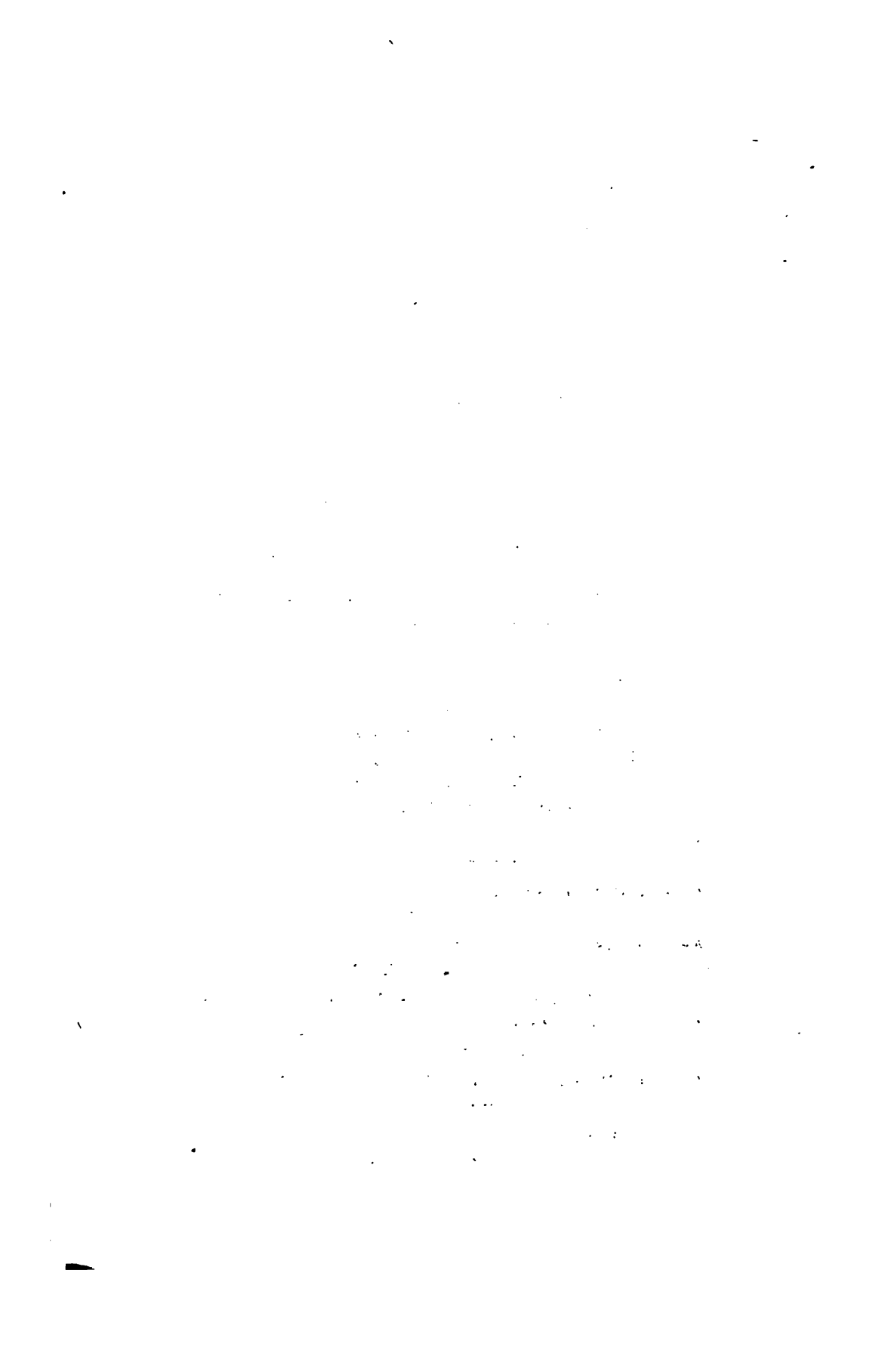
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JUDGES
OF THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK,
DURING THE TIME OF THIS VOLUME OF REPORTS.

WILLIAM E. CURTIS,
CHIEF JUSTICE.
JOHN SEDGWICK,
HOOPER C. VAN VORST,
GILBERT M. SPEIR,
CHARLES F. SANFORD,
JOHN J. FREEDMAN,
JUSTICES.



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The attention of the profession is called to the fact that the court of appeals, in many cases, decide an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the general term does not necessarily show that the court of appeals concurred in or dissented from the statements contained in the opinion of the superior court.

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CASES ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK
AT GENERAL TERM.

**WILLIAM T. THOMSON AND ANOTHER, PLAINT-
IFFS AND RESPONDENTS, v. THE BANK OF
BRITISH NORTH AMERICA, DEFENDANT AND
APPELLANT.**

I. DEPOSITARY,

**LIABILITY OF TO DEPOSITOR WHEN NOT DISCHARGED BY CHECK
DRAWN BY HIM on account of the deposit upon a bank, and
at the request of the depositor made payable to a third party,
and delivered to the depositor.**

1. RECEIPT. A bare receipt of the check will not discharge
him.

(a) The depositor, upon returning the check unindorsed,
in such state that the depositary's rights had not been
changed to his harm, and without having dealt with it
in a way that had damaged the depositary, has still the
right to demand the money on deposit.

2. RETENTION. A bare retention by the depositor for any
period less than six years, the bank remaining solvent, will
not.

3. PAYMENT BY BANK. This, if made on a forged indorsement,
will not.

4. ACQUIESCENCE OF DEPOSITARY IN PAYMENT BY BANK.

Statement of the Case.

(a) This will not, if the payment was on a forged check, although, the forgery being unknown to the depository, *the acquiescence continued until the Statute of Limitations* would prevent a recovery from the bank.

1. *Notice by depositor.* He being ignorant of the forgery, *want of notice by him, will not alter the effect of the acquiescence.*

II. CHECK.

1. CONVERSION OF, WHAT WILL CONSTITUTE.

(a) BY BANK.

1. A bank on which a check is drawn by A. for money deposited with him by B., and at B.'s request made payable to C., becomes liable to A. for conversion *by taking and paying the check* upon a forged indorsement, before its delivery to C.

(b) BY DRAWER.

The drawer of such check, *by, after its payment by the bank, assuming dominion over it* for the purpose of finally extinguishing B.'s claim to the money on deposit, is also liable to B. for a conversion.

1. DEMAND AND REFUSAL.

(a) Not necessary in such a case.

2. *Graves v. American Exchange Bank*, 17 N. Y. 205, *explained.*

(a) The court did not mean to hold by the language used that, under the facts of that case, there would not have been a conversion without a demand and refusal.

III. CHECK, CERTIFICATION OF.

1. DRAWER, EFFECT OF AS DISCHARGING HIM, OR NOT.

1. A bare certification, of itself alone, at a time when the drawer is not entitled to be relieved from any risk connected with the funds in the bank, will not discharge him.

2. A holder of a check, with no specific day for payment, may withhold its presentation for payment for six years from date, and the drawer undertakes for that period to keep the drawee in funds. A certification is a promise by a drawee to do, so far as the fund is concerned, the same thing that the drawer undertook. It follows *that a mere certification of such a check will not discharge the drawer. He will only be discharged, either in the event of a loss or injury accruing from a neglect to present for payment within a reasonable time after the date of the check, or in the event of a neglect to present for payment within six years from date.*

Statement of the Case.

A FORTIORI,

Where the drawee, having previously certified a check given to A., payable to the order of B., pays it on a forged indorsement, and returns it to the drawer, the drawee at the time of such return being solvent, and there being up to that time no more delay than would have been allowed or expected by the drawer, for A. to deliver the check to B., or to return it in case a delivery was not made.

8. *First National Bank v. Leech*, 52 N. Y. 350, distinguished.

(a) The rules there laid down do not apply to a case where, as between the parties, it had not become a duty to present for payment, and payment in fact had not been demanded.

IV. FORGED INDORSEMENT.

1. PAYMENT by a drawee of a CERTIFIED CHECK upon a forged indorsement of the payee's name.

(a) *Effect of as discharging drawee; see supra.*

V. COSTS ON APPEAL.

1. MODIFICATION OF JUDGMENT, WHEN IT WILL NOT DEPRIVE RESPONDENT OF COSTS.

(a) Where it appears to the appellate court that *the court below would*, if specific attention had been called to the point raised on appeal, and as to which a modification is desired, *have held in accordance with the views of the appellate court*, the modification need not be made to depend on the respondent's being deprived of the costs of the appeal.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided March 3, 1879.

Appeal from judgment, upon decision of a judge, at special term, without a jury.

On and before March 9, 1870, the defendant was a banker at the city of New York, having funds of plaintiffs on deposit. The plaintiffs wishing to invest in bond and mortgage, their attorney-at-law told them that he had arranged with Mrs. Halpine that she should give her bond and a mortgage on land for a loan by plaintiffs of \$17,500. On March 9, 1870, one of the plaintiffs went with the attorney to the defend-

Statement of the Case.

ant's bank. The plaintiffs drew on the defendant the following:

“NEW YORK, 9 *March*, 1870.

“On demand, pay to me, or bearer, seventeen thousand five hundred and sixty-two dollars, and debit acct. of W. T. Thomson and W. M. Ramsay.

“W. M. RAMSAY.”

By due arrangement, the funds were under the control of Ramsay. On the delivery of this draft, the defendant paid the plaintiff \$62 in money, and a check, drawn at the plaintiff's request to the order of Mrs. Halpine, as follows:

“No. 169. NEW YORK, 9 *March*, 1870.

“The Merchants' National Bank, pay to Margaret G. Halpine, or order, seventeen thousand five hundred dollars, in current funds.

“\$17,500.”

Before this date, the attorney of the plaintiffs had been also the attorney of Mrs. Halpine. In addition, he acted as her agent in caring for her property generally. She was in the habit of signing papers on his direction, without knowing their contents. She required \$15,000, and negotiations to her knowledge were on foot to borrow it from the Widows & Orphans' Loan Society upon her bond and mortgage. On March 9, at request of the attorney, and without knowledge of the contents, she signed a bond and mortgage for \$17,500 to the plaintiffs.

On the same day, the attorney deposited in his bank the check having thereon the words “Margaret S. Halpine.” This indorsement was forged, being made without authority. Under this indorsement were the indorsements of the attorney, and then of Howes & Macy, who again deposited the check in their bank. On the day of its date, the check was

Appellant's Points.

certified by the Merchants' Bank. The judge found that it did not appear by whom it was presented to be certified, nor was there any proof of the point in the various transfers when it was certified.

The attorney paid to and for Mrs. Halpine, down to May 13, various sums, amounting in all to \$3,200, by checks upon his bank, but she was at all times, and until the final exposure of the fraud, in ignorance of the existence of the mortgage, or the check, or the fact of deposit.

On May 13 the loan for \$15,000 was made upon Mrs. Halpine's bond and mortgage. That mortgage having been forthwith recorded, the attorney caused to be recorded, in June, the mortgage made to plaintiffs for \$17,500, and sent it with the bond to the plaintiffs, who resided in Canada. From that time, until the latter part of 1876, the attorney paid to the plaintiffs the interest, but ceased in 1876. Thereupon, the plaintiffs making inquiry, the nature of the transaction was disclosed, Mrs. Halpine brought her action to cancel the bond and mortgage to the plaintiffs, and had judgment to that effect.

The check having been paid by the Merchants' Bank, its amount was charged to the defendant, and the check was sent to the defendants as a voucher for such charge, and retained by them. The defendants charged the amount to plaintiffs about the time of the transaction. They acquiesced in this until discovery of the fraud. This action is brought to open the account between the parties to the action, and for judgment for \$17,500 and interest.

Cole & Kingsland, attorneys, and *John D. Parsons* and *Hugh L. Cole*, of counsel, for appellant, on the questions discussed by the court, urged:—I. As between the parties, it is the defendants who are entitled to the greater consideration. To them it was a

Appellant's Points.

matter of no concern whether they paid the \$17,500 in bills, in a check to the order of Mr. Ramsay, in a check payable to bearer, or in any other way. (a) The check was charged by the defendants against the plaintiffs' account on March 9, 1870. It was not until October, 1876, that the defendants were notified that there was any question about the indorsement. More than six years had then elapsed. The Merchants' Bank was thus enabled to defend any claim made by the defendants against them on the ground of the statute of limitations. During all that time the plaintiffs received interest upon the bond and mortgage; so that, however the case may be regarded as between the parties to the suit, the loss should fall upon the plaintiffs rather than upon the defendants.

II. There is another position which furnishes a complete answer to the plaintiffs' claim. The order signed by the plaintiff Ramsay shows that the check of the defendants upon the Merchants' Bank was intended to be payable to bearer. The defendants were willing to pay in that way. It was at the request of the plaintiffs that the check was made payable to the order of Mrs. Halpine. The defendants did not know Mrs. Halpine, had never heard of her, and could not possibly have honored Mr. Ramsay's draft by a check to her order except upon his special request to pay his draft in that way. They obtained \$62 in currency for him, and would have done the same for the amount of the draft, if requested. The intention of the parties was that the check, however drawn, should pay the \$17,500. The case is very different to what it would be if the defendants had given a check upon themselves. They gave a check upon the Merchants' Bank, good for the amount; they gave it to the plaintiffs in payment of their draft. Where it is the intention of the parties that commercial paper shall make payment, the debt is paid (2 *Dan. Neg. Inst.* 542; *Smith v. Mil-*

Appellant's Points.

ler, 43 *N. Y.* 172 ; Herring v. Sanger, 3 *Johns. Cas.* 71. KENT, J. : " It is a settled rule of law that accepting a note for a debt due is no payment of the debt unless it be specially so agreed, or unless the creditor negotiates the note ").

III. The certification of the check by the Merchants' Bank operated not only like an acceptance of a bill of exchange, in making the Merchants' Bank primarily liable, but as to the defendants it was equivalent to the payment of the check, and absolutely discharged them. As between the drawer and the payee the certification of a bank check is not merely the same as the acceptance of a bill of exchange. It is something more (*Robson v. Bennett*, 2 *Taunt.* 388 ; *Willets v. Phoenix Bank*, 2 *Duer*, 121 ; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 4 *Id.* 219 ; Same Case on Appeal, 14 *N. Y.* 624 ; *Mead v. Merchants' Bank*, 25 *Id.* 143 ; *Merchants' Bank v. State Bank*, 10 *Wall.* 603 ; *Cooke v. State National Bank of Boston*, 25 *N. Y.* 97 ; *First National Bank of Washington v. White*, 4 *Otto*, 343 ; *Marine National Bank v. National City Bank*, 59 *N. Y.* 71 ; *Freund v. Importers' & Traders' National Bank*, 12 *Hun*, 737). These authorities fully disclose the course of the decisions, and the steps whereby the present state of the law has been reached. As soon as the question of the liability of the drawer to the holder of a certified check came to be considered, the difference between certification and acceptance was very broadly laid down, and it was held that the certification of a check not only operates like the acceptance of a bill to make the bank primarily liable to the holder ; but also that it operates, as far as the drawer is concerned, as payment, and absolutely discharges him from liability (*First National Bank of Jersey City v. Leach*, 52 *N. Y.* 350 ; *First National Bank v. Whitman*, 4 *Otto*, 343 ; *Freund v. Importers' and Traders' National Bank*, 12 *Hun*, 537, General Term, October,

Appellant's Points.

1877). The distinction was arrived at because the theory of the law, and the practice of the banks, is that where a check is certified by a bank the amount thereof is immediately charged to the account of the drawer, and thereafter the drawer cannot draw out or dispose of that portion of his deposit which is necessary to pay the accepted check (*Merchants' Bank v. State Bank*, 10 *Wall.* 605; *Marine National Bank v. National City Bank*, 59 *N. Y.* 71; *First National Bank v. Leach*, 52 *Id.* 350; *Freund v. Importers' and Traders' National Bank*, 12 *Hun.* 537). And "the reason" for this practice "is so strong that the law presumes it to be adopted by the banks" (*First National Bank v. Leach*, *supra*). But an acceptor of a bill of exchange has no right "to charge it in an account against the drawer from the date of acceptance, unless he pays the whole amount at the time, or discharges the drawer from all responsibility" (1 *Dan. Neg. Inst.* 395; *Bracken v. Willing*, 4 *Call [Va.]*, 288).

IV. It seems perfectly clear that, no matter who presented the check for certification, the effect of certification, as to the drawer, is the same. And so we find that, although Mr. Justice PECKHAM in an *obiter dictum*, in the *First National Bank v. Leach*, above cited, thought that the drawer would not so be discharged in a case where the check was first certified at the instance of the drawer and afterwards delivered; nevertheless, Mr. Justice HUNT, of the supreme court of the United States, in the *First National Bank v. Whitman*, holds that the drawer is discharged by certification, whether the certificate be obtained before the check is delivered to the payee or afterwards. "It is a contract recognized by the law, valid in its character, which essentially changes the position of the parties. The privity of contract with the drawee, which before pertained to the drawer alone, is now imparted to the payee, and the duty which before existed in the drawer

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now exists in the payee." And this conclusion is reached with the opinion of Mr. Justice PECKHAM immediately under review. This decision has been followed by our own courts in a very recent case (*Freund v. Importers' and Traders' National Bank*, 12 *Hun*, 537).

V. But whether or not the certification of the check amounted to a payment, and absolutely discharged the drawer, it is certain that the effect was to make the Merchants' Bank primarily liable, and to make it the duty of the holder of the check to present it to the acceptor for payment. It is only after such presentation and a refusal to pay that the holder of the check can have recourse to the drawer. No such presentation for payment was made; nor is any such alleged or pretended to have been made. And no demand for the check was made upon the defendants; a different case would be presented if such a demand had been made and refused. The plaintiffs have sued upon a wholly different allegation.

VI. The plaintiffs were ordinary depositors in the defendant's bank. Their deposits did not bear interest. Interest on this \$17,500 in controversy could not begin to run therefore until actual demand for payment had been made by the depositors (*Reid v. Duncan*, 1 *La. Ann.* 265; *Downes v. Phoenix Bank of Charlestown*, 6 *Hill*, 299; *Payne v. Gardiner*, 29 *N. Y.* 164). The only communications which transpired on the subject between the parties or their attorneys are the conversation between Mr. Hill and Mr. McNab, of October 4, 1876; the letter of Messrs. Redfield & Hill, of January 24, 1877; the reply thereto of January 27, 1877; the complaint which was served June 21, 1877, and the answer which was served October 24, 1877. None of these demanded the payment of the deposit, and certainly none of them could be the basis of a charge for interest from September 15, 1878. In fact, however, the interest was

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not calculated from any supposed or alleged demand, either actual or constructive, but from the date when Mr. Barrett ceased to pay the plaintiff's interest on the bond and mortgage. Interest was payable on the bond on March 9 and September 9. Mr. Barrett paid it regularly up to his disappearance in 1876. The next interest was due September 9, 1876, and the plaintiffs have been charged with it ever since. Why the *fifteenth* of September was selected it is impossible to guess, as that date corresponds with nothing in the case.

Redfield & Hill, attorneys, *A. A. Redfield* and *Thos. G. Shearman* of counsel, for respondents, on the questions discussed by the court, urged :—I. The whole argument for the defense rests upon the assumption that the defendant will suffer loss by the correction of this account, and that it stands in a position which entitles it to more favor from the court than the plaintiffs. But this assumption is unfounded. (1.) The defendant has this money as much within its control now as it ever had. In March, 1870, when the plaintiffs applied for the money, it did not have the actual currency in its possession, nor any fund in bank to which it had specific title. It had simply a lawful claim against the Merchants' National Bank for that amount, which claim, at the request of the plaintiffs, it undertook to transfer to Mrs. Halpine. But this transfer was never, in fact, completed; and the Merchants' Bank never having paid anything by authority of the defendant, or of Mrs. Halpine, is still liable to the defendant for the \$17,500, exactly as it was in March, 1870. The indorsement being a forgery, is no justification to the Merchants' Bank; and the position of the defendant has never for an instant been changed by the forged indorsement. (2.) The only doubt which can be suggested upon this point arises concerning the effect of the statute of limitations. But the defendant having

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kept a continuous deposit with the Merchants' Bank, and never having demanded payment of its entire balance, nor of this particular \$17,500, which is a mere undivided part of such balance, the statute of limitations is not running. It will not begin to run until a formal demand has been made by the defendant upon the Merchants' Bank for the payment of the balance, including this amount. This proposition is, indeed, self-evident, without reference to authorities; for the very object and purpose of keeping a bank account is, that the depositor may let his money lie as long as he chooses; and, on the other hand, no banker would think of accepting a deposit account, if he could be made liable to the expense and annoyance of a lawsuit, when he had never been asked to return the money. But the authorities are direct upon this point (*Downes v. Phoenix Bank*, 6 *Hill*, 297; *Payne v. Gardiner*, 29 *N. Y.* 146; *Boughton v. Flint*, Ct. Appeals, 18 *Alb. L. J.* 337). (3.) The defendant has the check in its possession, certified by the Merchants' Bank as good, and, if it chose to enforce its rights by the medium of that check, could easily obtain the genuine indorsement of Mrs. Halpine, and draw the money. The payment by the Merchants' Bank upon a forged indorsement would be no defense to that bank (*Graves v. American Exchange Bank*, 17 *N. Y.* 205; *Talbot v. Bank of Rochester*, 1 *Hill*, 295). (4.) But the defendant can enforce its rights without the indorsement of Mrs. Halpine; for she has, on two occasions, under oath, disclaimed all interest in the check, and denied the authority of Mr. Barrett to obtain it for her. The Merchants' Bank would, therefore, be bound to cancel its certification upon the demand of the defendant, and could not set up such certification as any defense to the defendant's claim. Substantially, the certification was obtained by mistake; and upon Mrs. Halpine's disclaimer of all interest in the funds thus transferred

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to her credit upon the books of the Merchants' Bank, the liability of that bank to the defendant revives, and the defendant is entitled to recover the amount of its deposit with the Merchants' Bank, precisely as though no certification had ever been put upon the check. (5.) Thus it may be seen that the defendant has all the necessary remedies in its possession, and stands in as good a position as it ever did; while the plaintiffs have no claim against any one except the defendant, and are deprived by the willful act of the defendant of all power to sue the Merchants' Bank upon the check. If the defendant had offered to give the plaintiffs the check, it would now stand in a much better position; but not only has it never offered to do this, but in the letter of January 27, 1877, it expressly disclaimed all liability, and refused to do anything whatsoever to relieve the plaintiffs from loss. (6.) It thus appears that the plaintiffs are remediless, except in this action, while the defendant is abundantly protected by means of the responsibility of the Merchants' Bank.

II. The receipt of a check upon the bank did not operate as a payment of the defendant's debt; and the plaintiffs had a right to demand payment of the original debt from the defendant, without having recourse to the check (*Bradford v. Fox*, 38 *N. Y.* 239; *Turner v. Bank of Foxlake*, 4 *Abb. Ct. of App.* 434).

III. The defendant relies upon the certification of the check as a defense to our action in its present form. But that certification, by whomsoever obtained, was obtained without authority, and the Merchants' Bank would be bound to cancel it upon the defendant's application. The drawer of a check is not discharged by its mere certification. It is the fact of leaving the money in the bank, and thus delaying the demand of payment, which is held to discharge the drawer. This is clearly shown by the very case in the court of appeals, which is cited by the defendant's counsel.

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After describing the process of certification as a declaration by the bank that the check is good, and that it has the money of the drawer ready to pay it, which money the holder of the check refuses to receive, the opinion of the court says, "The law will not permit a check when due to be thus presented, and the money left with the bank for the accommodation of the holder, without discharging the drawer" (*First Nat'l B'k v. Leach*, 52 *N. Y.* 350).

IV. There has been no such delay or acquiescence on the part of the plaintiffs as to constitute any bar to their claim. It is expressly admitted by the answer that whatever acquiescence there was, was made without knowledge of the facts; and acquiescence, like the ratification of an unauthorized act, if made without full knowledge of the circumstances, is no bar (*Weisser v. Denison*, 10 *N. Y.* 68; *Life Association v. Siddal*, 8 *De Gez. F. & J.* 58, 74; *Perry on Trusts*, §§ 849, 851).

BY THE COURT.—SEDGWICK, J.—The testimony sustains the finding of the learned judge, that the attorney was not the agent either of the plaintiffs or of Mrs. Halpine, in obtaining the money upon the check by means of the forged indorsement, neither had she authorized the indorsement.

The testimony as to the bond and mortgage was important for the purpose only of determining whether there had ever been an actual or constructive delivery of the check to Mrs. Halpine, or whether the indorsement was hers as made by her agent. It is not necessary to give this matter further attention.

When the plaintiffs presented their order for the money to the defendants and received upon it the check in question, drawn to the order of Mrs. Halpine, the mere receiving of this check was not a final or absolute satisfaction of the plaintiffs' rights as to their

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money deposited with defendants. The plaintiffs had the right still to demand the money on deposit, if at the same time they returned the check, unindorsed, and in such a state that the defendants' rights had not been changed to their harm, and if the plaintiffs had not dealt with the check in a way that had damaged the defendants. It is to be particularly observed, that the holder is not chargeable with damage for negligence arising only from his keeping the check unrepresented, until the day after its delivery.

In the present case, the check is in possession of defendants, without payment, for the payee never indorsed. The bank on which it was drawn took it on the day next its date. If the defendants have suffered damage from a dealing by plaintiff with the check, it has come from the check being certified by the bank, the subsequent taking of that check by the bank, the charging its amount to the defendants, and the defendants acquiescing in that charge, until a time, when, as the learned counsel for defendants argues, the statute of limitation prevents the defendant recovering from the bank the amount improperly charged by the latter.

A scrutiny of these acts shows that for the most part they are either tortious as to the plaintiffs, or voluntary by the defendants and the bank, as not the performance of any valid obligation between them.

The check having been made to a third party, was, to the knowledge of the parties, inchoate, and would be so until delivered to the payee. This affected to a due extent the implied contract. No cause of action could exist on the check as a chose in action, until the payee received it. At no time could the defendant get any right, as if upon a payment, until she indorsed it. The bank had no right to take the check and pay its amount until she had indorsed it.

The bank, in taking that check as it did, and as-



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suming the right to pay it, was liable to plaintiffs for a conversion of it. They were the owners of the piece of paper, with the inchoate contract upon its face. It is not necessary to determine the measure of the plaintiffs' damages for such conversion. It may be that it would be a sufficient reason, under the circumstances, to place the damages at a nominal amount; that the only value of the check was that plaintiffs must have it in order to bring an action against defendants for the original deposit, and that, as the bank had returned it to defendants, such an action could be brought without possession of the check. The quality of the act of the bank is of importance. It was wrongful to the plaintiffs. The defendants were also liable to the plaintiffs for a conversion of the check, when the defendants assumed dominion of the check, for the purpose of finally extinguishing plaintiffs' right as to the money deposited with them, in derogation of the true title and right to possession.

In *Graves v. American Exchange Bank* (17 N. Y. 205), the defendant was the drawee of a bill of exchange, payable to the order of one who afterwards assigned to the plaintiff. A person having the same name as the payee, indorsed and presented the bill to the defendants, who paid it to him. The action was for a conversion of the bill, and judgment against defendant affirmed. Judge COMSTOCK, in the opinion, said: "The defendant having got possession of it through a false or forged indorsement, and having refused to deliver it up or pay it to the owner, was liable for its conversion." The learned judge did not, however, mean to say that it would not have been a conversion, if the plaintiff had not demanded it. The check, as in the present case, was never rightfully in possession of the bank, but the original taking was tortious, and no demand was necessary to put an end to a previous rightful holding. The bank and the de-

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defendants were jointly liable as to the act by which the latter received the check from the former (*White v. Sweeny*, 4 *Daly*, 223; *White v. Mechanics' National Bank*, *Id.* 225).

When the bank sent the check to the defendants as voucher for charging them with the amount paid upon it, the defendants' acquiescence in that charge was purely voluntary on their part. By reason of the original understanding and contract, the check was to be paid to the order of a third party. The defendants could not base a right as against the plaintiffs upon a payment to any one else. They suffered the charge, made by the bank unnecessarily and voluntarily (*Morgan v. Bank of the State of New York*, 11 *N. Y.* 404, affirming 1 *Duer*, 434). At this point it is to be seen that the omission of plaintiffs to notify the defendants of the fact does not place the defendants in the better position. The defendants had contracted against paying on a forged indorsement. They did pay, or acquiesced in the payment, within a short time from the actual forgery. The plaintiffs, ignorant of the forgery, at most could only have instigated the defendants to bring an action against the bank, based upon a transaction which, as against the plaintiffs, should never have taken place.

The only facts left upon which the defendants can rely, as a cause of damage, from neglect or laches of plaintiff, are that the check was actually certified, and remained so for a period of time, viz.: about thirty days before it came into defendants' possession. It is argued the certification was a discharge of the defendants.

It does not clearly appear at what point the bank certified the check, or in whose hands it then was. There is no finding as to this. On the testimony it appears that it was certified on the day of its date, but no reason was shown for its being certified by the

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attorney who procured the money upon it, more than by the private bankers, with whom it was deposited by the attorney, and who may either have wished to draw upon it themselves at once, or to protect themselves against its being drawn upon by their depositor. There was, of course, no reason for certifying it for Mrs. Halpine's protection, as there was clearly no intention of carrying out the matter of the bond and mortgage on her behalf.

It would not, however, in view of the peculiarity of the case, be satisfactory to determine it upon the assumption that the attorney did not have the check certified, and if he did I would hesitate unnecessarily to decide, that, where a person placed a check in possession of another it did not imply to the bank sufficient authority from the owner to present the check for certification. The issues here may be determined without passing upon such a proposition. It is only necessary to decide whether, upon any assumption, the certification in this case discharged the defendants.

The position of the defendants is, that upon certifying the check the presumption is, that the bank withdrew the amount from the credit of the defendants and placed it to the credit of the certified check, and that that resulted in the defendants' discharge. It is argued that a check is given for presentation for payment and not for certification, and that if the holder choose to have it certified he uses the funds of the drawee in a manner unauthorized by him.

An important fact must be kept in mind. The defendants knowing that the check was inchoate in plaintiffs' hands, contemplated a delivery to the payee according to the usual methods and delays of business, and the question is whether a person situated as plaintiffs could before delivery have a check certified without discharging the drawer.

As a check is a chose in action, not an assignment


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of a fund, it is executory or promissory. If it remain promissory after certification the drawer remains liable. This is clearly the case when the drawer has it certified before delivery by him. It is also clear, that if the holder choose voluntarily to take a certification or rely upon one already made, at a time when it is his duty to relieve the drawer from any risk connected with the funds remaining with the bank, the drawer is discharged. But there is a middle ground to be examined, and that is when by the contract the holder can refrain from presenting the check for payment, and yet the drawer is bound to keep the bank in funds.

The fact taken by itself, that the bank certifying transfers the amount from the drawer's credit, does not absolutely work the discharge of the drawer. That is done by the acceptor in funds when he accepts a time bill. The discharge is prevented by the fact that the drawer contemplates this transfer of his funds, and impliedly contracts that the acceptor will pay it over, at maturity. And at maturity the holder must present and receive payment, for he has no authority by the contract to allow the funds to remain longer with the acceptor at the drawer's risk.

When a check is paid out, the presumption is that it is drawn against funds, and, therefore, the contract implies that the drawer will keep the funds there to meet the check. If the bank remain solvent, the drawer must keep the funds at the bank to meet the check for six years, or if he withdraw them, he is liable upon the original demand if not upon the check. The holder brings the check to maturity at his pleasure. He may present forthwith if he please, or he may withhold.

The specific and the general rules as to presentation, demand and notice, that are applied to commercial paper, are based upon presumptions or proof of damage from an omission to present, or demand, or



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notify. Notices and demands are excused in certain cases upon proof that no damage could occur.

In cases like the present, there is no damage or presumption of it, from the nature of the certification, as it was made at a time when the plaintiffs were at liberty to keep the check unrepresented. The certificate was a promise of the bank to do, so far as the fund was concerned, the same thing that the drawer had promised. The modification of the original contract was in the drawer's favor, as they become only secondarily liable.

Whether or not an entire omission by plaintiff to present for payment, after the check had been certified, would have discharged the defendants, does not call for decision. The bank took it in its possession the next day after certification, and shortly thereafter the defendants received and kept it. These periods were no greater than it is presumed the plaintiffs were at liberty to hold the check, before delivering it to the payee, and until delivery the defendants did not require it to be presented for payment, and were bound to keep the bank in funds. These are proper deductions from the case of *First Nat. Bank v. Leech* (52 N. Y. 350), in which Judge PECKHAM delivered the opinion. For that case was one where the check had been presented on the day on which it was specifically made payable by its terms. The most of the illustrations in the opinion are of checks stated to be due. There was no intention of applying the rules to a case where, as between the parties, it had not become a duty to present for payment, and payment, in fact, had not been demanded.

I perceive that in the opinion last cited are statements from which it might be argued, that the drawer is discharged if the bank withdraws from his credit the amount of a check, at a time when the money might have been demanded. The opinion, however, was written to decide a case in which the check had

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a day fixed for its payment. It was avowedly based upon the position, that allowing the funds to remain with the bank was an act for which the drawer was not responsible. But the drawer in a case like the present contracts that the funds shall remain for a certain time. They remain by his consent. The certification does not deprive him of a use of the funds for any time, that he did not intend. They remain for his benefit; while it might be otherwise if they remained for a period not contemplated by the parties, and therefore solely for the benefit of the holder.

The general custom is to have checks certified on the day they are received. This is generally done by or on behalf of the drawers. But in many cases the certification is procured on that day by or for the payee, and the check is then deposited, to be collected the next day. It is not thought that the drawer is to be discharged by such a certification, although the question can seldom arise, as it is very rarely that a bank becomes insolvent.

My general conclusions are that the certification did not, at the time it was made, lead to a transfer of funds to the injury of defendants, and that the funds would remain for the benefit and by the consent of defendants at least to the next day, that time being named as the limit within which the obligations of the defendant were absolute to provide for payment, irrespective of any omission by the holder, and that in this case the defendants contemplated some delay in the plaintiffs delivering the check to the payee or in returning it if not delivered.

If I am correct in the views expressed, it is not material that the plaintiffs gave no proof as to the present solvency of the bank in order to show that the defendants might still recover the amount from it. It sufficiently appeared that down to the time when the defendants took the check into their possession, the

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bank was solvent, and it further appeared that up to that time there was no more delay than would have been allowed or expected by the defendants, for the plaintiffs to deliver to the payee, or to return to the defendants in case a delivery was not made, whatever the reason. In fact, it seems to me that upon the defendants taking exclusive possession of the undelivered certified check that belonged to the plaintiffs, they assented to the use of the fund actually made by the bank. The fact that the check never went into the hands of the payee makes it unnecessary to determine what rights the defendants would have otherwise had to require presentment for payment to the bank before resorting to defendants. The rights of the defendants are confined to any damage, it appears or is presumed, followed any negligence of the plaintiffs. I do not see that any negligence can be attributed to the plaintiffs beyond their permitting or being responsible for the certification.

The case is not complicated by the plaintiffs becoming repossessed of the check before this action. The assignment made by Mrs. Halpine would have only justified an action upon the check as such, if it had been returned to plaintiffs, but it never was, and the plaintiffs would not have been bound to retake it from a wrong doer.

On the evidence, as I read it, interest should not have been calculated from an earlier date than January 24, 1877, that being the time of the first defendants' demand. As I think the court below would have so held, if specific attention had been called to this, it is not necessary to make this modification depend upon the plaintiffs being deprived of the costs of the appeal.

With the reduction suggested the judgment should be affirmed with costs.

FREEDMAN, J., concurred.

Statement of the Case.

SARAH H. HAZEWELL, PLAINTIFF AND APPELLANT, v. GERSHOM H. COURSEN, DEFENDANT AND RESPONDENT.*

I. Trial, conduct of.

1. INCONSISTENT CLAIMS.

(a) Right of party to go to the jury on.

A party should not be allowed to go to the jury in such form as that, in event of one claim distinctly interposed by him and sustained by his evidence being rejected by them, he may fall back upon another position, upon which to rest a verdict wholly irreconcilable with the one disallowed, without sufficient evidence to support it.

1. Limitation of right in this respect.

(a) A party must be limited to a consistent statement of a claim.

2. POSITION TAKEN AT TRIAL, EFFECT OF.

(a) When counsel at the trial limits himself to a distinct position with reference to his client's rights, there is no error in confining him to such position.

II. Maxims.

1. Allegans contraria non est audiendus.—This maxim applied.

III. Trotter.

1. CONVERSION, WHAT MAY BE THE SUBJECT OF.

(a) Contract for sale of lands may be.

IV. Non negotiable chose in action.

1. ASSIGNEE FROM AGENT OF OWNER TAKES AS AGAINST THE OWNER, WHEN.

(a) When the agent is vested with the apparent control as owner, and the assignee is a bona fide purchaser for value without notice.

1. VALUE, WHAT CONSTITUTES IN SUCH CASE.

1. Voluntary assumption by AGENT of a claim for which he was not liable, but which was necessary to be paid to secure certain interests of the assignee, and which

* NOTE.—On a former trial of this action the complaint was dismissed. On appeal to the general term, a new trial was ordered. For the opinion of the court delivered on that appeal, see 36 *N. Y. Super. Ct.* 439.

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the assignee declined to pay, and the subsequent assignment of the chose in action in consideration of the assignee's payment of the claim, *and its subsequent payment by the ASSIGNEE, will constitute parting with value.*

(a) In the case at bar the assignee had become involved as a defendant in a litigation with a third party, in which suit the assignor had improperly interfered and made statements adverse to the assignee's interests, which the assignor afterward admitted to be unfounded, and withdrew; but the action could not be withdrawn, and the assignee's interest secured without the payment to the plaintiff's solicitor of \$2,000, which the assignee declined to pay, and the assignor thereupon undertook and promised to make the payment himself. And thereupon, to raise the money with which to make such payment, he sold the chose in action to the assignee, who paid him therefor \$250 cash, and agreed to pay the said the \$2,000, which he afterwards did:—

HELD,

that the payment of the \$2,000 was parting with value, *although the \$2,000 was not a legal debt of the agent until he undertook to pay it.*

2. APPARENT CONTROL OF AGENT AS OWNER.

1. Where the agent is intrusted by the real owner with an assignment of a chose in action *executed in blank*, he is invested by the owner with the apparent control of it as owner.

Before VAN VORST and SPEIR, JJ.

Decided March 3, 1879.

This action is for the conversion of a certain contract. The contract was made between J. N. Fellows and George R. Hazewell, and by it Fellows agreed to sell and convey to said George R. Hazewell fifty acres of land for \$20,000, payable in installments as follows: \$2,000 on May 26, 1860, \$3,000 on Jan. 5, 1861, when a deed was to be given to said George R. Hazewell, or to any person he might designate, and a

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mortgage was to be given back for \$15,000, payable in installments. The complaint alleged that said George R. Hazewell, on May 22, 1861, assigned the contract to George C. Genet in trust for the plaintiff; that about Nov. 20, 1863, Genet, without plaintiff's knowledge, executed an assignment of the contract in blank and delivered it to George R. Hazewell, who, on July 26, 1865, filled in defendant's name in the blank assignment and delivered it to the defendant as security for a loan of \$250; and that plaintiff had tendered \$250, and interest thereon, to defendant, and demanded said contract and a return thereof, which was refused by him.

Neither the contract, nor the assignment to Genet, nor that by Genet, disclosed any interest in the plaintiff in the contract. Other matters appear in the opinion.

George C. Genet, attorney, and of counsel, for appellant.

C. D. Burrill, attorney, and *John E. Burrill*, counsel, for respondent.

BY THE COURT.—VAN VORST, J.—Two questions were principally litigated on the trial of this action.

One was, whether or not the plaintiff was the owner of the contract, made between Fellows and George R. Hazewell, described in the complaint; and the other whether or not the defendant was guilty of a conversion of the same. As neither on the face of the contract, nor in the assignment thereof by Hazewell to Mr. Genet, is any interest in the plaintiff disclosed, the fact of the plaintiff's ownership, if it existed, would have to be established by extrinsic evidence.

This the plaintiff sought to prove on the trial. The principal witness called on the plaintiff's behalf, to testify on this subject, was her husband, George R.

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Hazewell, one of the parties to the contract. All payments on the contract had been made by him personally. Certainly, no person was in a better condition to show whose money it was, which entered into these payments. The first payment was made, as appears by a receipt indorsed on the contract, on the 20th day of May, 1860. The sum then paid was \$2,000; another payment of \$3,000 was made four years thereafter, in May, 1864.

Upon the trial, George R. Hazewell testified, that the first payment of \$2,000 was made at Scranton, in cash. He stated that he got this money in coin or bills from his wife. He says, "I stated to her when I got it, what use I intended to make of it; she approved of it and gave me the money."

In regard to the payment of \$3,000, made in May, 1864, he testified, that he got this money in bills from his wife, a day or two before the payment was made. That she came to his office and brought the money to him, to pay on the contract, and he paid it over.

The evidence of this witness was much shaken, both upon his cross-examination and through the testimony of other witnesses, in several particulars. Fellows, to whom the payments were made, is in conflict with him, as to the time when, the place where, and the form in which the payments were made. He is contradicted by other witnesses, as to several other matters testified to by him. The learned judge, in his charge to the jury, alluded to these contradictions, but in the end charged that if the jury should find "on the testimony of Hazewell that these \$2,000 and these \$3,000 were the moneys of Mrs. Hazewell, then on the first point they should find for the plaintiff." The plaintiff's counsel do not appear to have been satisfied with this limitation of the learned judge in his charge as to the moneys with which these payments were made, but sought to extend her right to the contract, through a

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general proposition, which the judge was asked to charge, that it was hers, if her money went into the contract at any time before the same was transferred to the defendant by her husband. The learned judge, admitting that such abstract proposition was true, stated that it had no reference to the facts in this action, as proved by the plaintiff, and declined so to charge, to which the plaintiff excepted.

The plaintiff's counsel also asked the judge to charge, that if Hazewell *owed* plaintiff, and he transferred the contract in payment of that debt to her, it gave her a title, even if the money paid was not her money. The learned judge declined so to charge, for the reason stated by him, that it was "an entirely different proposition" from what plaintiff had taken "during the trial;" and stated, "you choose to put yourself upon the fact that her money went into the contract, and we have tried the case on that assumption, and at the end of the plaintiff's case I asked what was the position taken by the plaintiff on that point, and it was stated that the \$2,000 and the \$3,000 were the moneys of the plaintiff at the time they were paid."

The plaintiff's counsel in this request doubtless relied upon the evidence of Mr. Genet and the plaintiff, to support the idea that the plaintiff's money in some other way went into the contract. The evidence to reach such conclusion is not satisfactory. But it was argued on the appeal, by the appellant's counsel, in support of this proposition, that the evidence shows that plaintiff had allowed her moneys, to the extent of \$12,000, to be applied by Mr. Genet, her agent and attorney, to satisfy a debt owing by her husband in the year 1857, to one of his creditors, and that Genet at about that time also paid to Hazewell, of the plaintiff's moneys \$2,500, in addition, to be invested by him for her, which it is now urged went into this contract. But these latter moneys, received two years before the

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contract in question was made, were not, and could not be the moneys, which, under the evidence of Hazewell, went into that contract. It is, however, attempted by the plaintiff's counsel to connect this latter contract with one previously made, called the Woodman and Fellows contract. But whatever money of plaintiff went into the Woodman and Fellows contract, if any, was wholly lost to her, as that contract was foreclosed by Fellows, through the default of the other party in making payments thereon, long before the contract of 1860 was made, and the property was bought in by Fellows; and that contract formed no part of the consideration of the contract now under consideration, as Fellows distinctly testified on the trial.

These claims now interposed by the appellant's counsel, would place the case before the jury in opposed positions. One ground distinctly and clearly taken under the evidence was, that it was with the plaintiff's identical moneys, placed by her in her husband's hands for the purpose, that the payments upon the contract in 1860 and 1864 were made.

This is unqualifiedly testified to by the plaintiff's husband, who made these payments. If his evidence was true, then the contract could not have been turned over in payment of a debt from her husband to the plaintiff, and it would have been her property in virtue of such payments. Nor does the evidence sustain the proposition that her moneys went into the contract, otherwise than by force of such payments.

We cannot discover any evidence which would have justified the jury in finding that the contract was turned over to Genet by Hazewell, in payment of a debt due from him to the plaintiff. And we conclude that the learned judge was right, in his instructions to the jury, in limiting the plaintiff's demands as he did, under the circumstances of the case, and the course of the trial, to the question as to whether the payments

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were made with her moneys as testified to by her husband, and if they were, the plaintiff would be entitled to a verdict.

A party should not be allowed to ask from the jury a verdict upon one of two or more claims, wholly opposed to each other.

A case should not be allowed to go to the jury in such form, that in the event that a claim distinctly interposed by one of the parties, sustained by his evidence, should be rejected by them, they might fall back upon another position upon which to rest a verdict, wholly irreconcilable with the one disallowed, without sufficient evidence to support it. Truth and justice require that a party should be limited on the trial to a consistent statement of a claim.

"*Allegans contraria non est audiendus*" is a rule of logic, and is applied in courts of law.

The learned judge states that the plaintiff's counsel limited himself to a distinct position with respect to the plaintiff's rights to the contract, and having done so, there is no error in confining the plaintiff to such position (*Paige v. Fazackerley*, 36 Barb. 392).

The remaining question is, was there a conversion. This inquiry could only, however, arise, should the jury find that the contract was the plaintiff's property. Hazewell testified that he received the contract, with his wife's assent, from Genet, to whom he had assigned it in 1860.

He testifies that he was authorized to borrow money on the contract, or if he saw a good opportunity, he was authorized to sell it. In his words "I was to borrow money on it, or sell it to obtain money for my own purposes. I was to use it as I pleased, either to sell it or borrow money on it."

Hazewell assigned and delivered the contract to the defendant, as he testifies, as security for moneys to be loaned thereon, to the extent of \$2,000, only \$250 of

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which was, however, paid. If that statement is true, the defendant, to whom a tender has been made of the amount so claimed to have been advanced upon the contract, and who refused to redeliver it, is liable, in the action for a conversion, and it would have been the duty of the jury so to decide.

The learned judge charged the jury that if plaintiff was the owner, and Hazewell had not been invested by her with the power of disposing of it as he pleased, but only for the purpose of raising money on it, and that if Hazewell parted with it, upon a promise on the part of the defendant to furnish \$2,000, only \$250 of which was paid, that then the defendant was guilty of a conversion of the contract. The judge's charge in this respect was correct. The testimony of Hazewell in regard to an agreement to loan \$2,000 on the contract is denied by the defendant. He swears that he purchased it from him.

The consideration for the purchase, as testified to by the defendant, was \$250, paid by him to Hazewell in cash, and the further payment of \$2,000 and upwards, expenses of an action pending in equity in the State of New Jersey, in favor of one Tilford against the defendant, which expenses, as claimed by defendant, were occasioned by the improper interference of Hazewell in such suit, in favor of the plaintiff therein, he having made certain statements and claims in that action prejudicial to the rights of the defendant, growing out of a policy of life insurance the subject of that action, and which had been theretofore assigned by Hazewell to the defendant.

These claims and statements of Hazewell, adverse to the defendant's interests, interposed in such action, were afterwards admitted by him to be unfounded, and he withdrew the same; but the action could only be withdrawn, and the defendant's interests secured,

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by the payment of certain expenses incident to the action, amounting to about \$2,000.

These facts were testified to by the defendant, who also stated that he refused to pay such expenses, and that Hazewell, who had occasioned them, agreed to do so. Hazewell proposed to raise the funds, according to the defendant's evidence, by disposing of the contract for that purpose. In their attempts to do this they were unsuccessful, and Hazewell in the end proposed to sell, and did sell the contract to the defendant for \$250 cash, but defendant was to pay, in addition, the expenses of the suit in New Jersey, which he afterwards did.

This is, in short, the defendant's account of the transaction, through which he acquired title to the contract.

The plaintiff's counsel submitted to the judge various requests to charge the jury upon this branch of the case.

The judge was in substance requested to charge the jury, that if they believed the money of the plaintiff went into the contract, defendant was not a *bona fide* purchaser thereof.

That the transfer to the defendant was entirely unauthorized by her, and did not operate to deprive her of her interest.

He also asked the judge to charge that the consideration from the defendant to uphold the transfer must be money and not a precedent debt, even although Hazewell may have been clothed with an apparent power to deal with the contract.

The judge did charge, that if the jury should find from the facts existing in the case that the plaintiff gave her husband the apparent control of the contract as owner, the defendant had a right to deal with him as the owner, and if in trusting to that he paid money upon it, he is a *bona fide* holder. And further, that if

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defendant made the agreement testified to by him upon the faith of the contract and assignments, and in the honest belief that the same belonged to Hazewell, and without notice that the plaintiff had any interest therein, and on such belief, and on the faith of the contract and assignment, paid the money testified to by him, that would entitle him to a verdict.

He also charged that if Hazewell's account of the transaction was true, and the plaintiff was the owner of the contract, she would be entitled to a verdict.

If on the other hand the defendant's account of the transaction was true, then all he did pay was money, and there was no precedent debt satisfied, because, on the faith of that assignment, defendant went to New Jersey and paid certain moneys, and therefore it was not a precedent debt.

We are of opinion that the charge of the learned judge was correct.

In regard to the moneys paid in New Jersey, the same was not a legal debt of Hazewell until he undertook to pay it.

It was, upon the defendant's evidence, an expense occasioned by the unjust interference of Hazewell in that litigation. Hazewell might feel himself in honor bound to pay it; defendant declined to pay it. We cannot say that he could have been legally compelled to pay it. It was to be paid, however, as a condition to the withdrawal of the litigation which Hazewell had encouraged. It was doubtless for the advantage of the defendant that it should be paid, still, he might, as he has testified he did, decline to advance the money.

Hazewell undertook to pay it himself. He thought he was under a moral duty to do so. And in selling the contract to defendant he provided for the payment of these expenses by the defendant. In this view the contract was not turned over to pay a precedent debt.

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It was in part to discharge an obligation, then first assumed and agreed to be paid.

We think it was fairly left to the jury to determine whether they would accept the statements of defendant or Hazewell in regard to this transaction, and as to the true consideration of the assignment. If the jury should believe Hazewell under the judge's charge the plaintiff was entitled to a verdict.

The jury evidently did not believe him, but accepted the defendant's account as true. The jury also passed upon the question of Hazewell's authority under the evidence.

If he exceeded his powers in making the transfer the plaintiff's title would not have been affected, for a purchaser of a chose in action must abide by the case of the person from whom he buys; and no title passes for value even unless the holder is clothed with title and power (*Moore v. Metropolitan Bank*, 55 *N. Y.* 41; *McNeil v. Tenth Nat. Bank*, 46 *Id.* 325; *Green v. Warnick*, 64 *Id.* 224; *Cutts v. Guild*, 57 *Id.* 229; *Shaffer v. Reilly*, 50 *Id.* 61).

But the question of Hazewell's power, who had been intrusted with the contract, having an assignment in blank indorsed thereon, as also the consideration paid therefor, was for the determination of the jury under the evidence and the judge's charge.

The extent of his power was a question of fact, and the jury has passed upon it.

As no substantial error is found in the judge's charge or in his refusals to charge, we cannot interfere with the result, as there is evidence to uphold the verdict.

It may well be that the defendant secured a profitable bargain, and if the plaintiff had in truth an interest in the contract the result may be to her pecuniary injury.

But these consequences cannot be remedied here, unless there was error in the trial.

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If the plaintiff intrusted her contract to her husband, to sell or dispose of as he might deem best for his own advantage, she cannot reasonably complain if the defendant's action, in treating with her husband, has resulted in a profitable arrangement for himself.

We have examined the exceptions taken by the appellant during the course of the trial, and can discover no error which would justify us in disturbing the result.

The motion for a new trial was properly denied by the judge who presided at the trial term.

There was a marked conflict in the evidence, and the credibility of the witnesses, and the truthfulness of their statements, was fairly submitted to the jury, in whose presence they were severally examined. The jury had the advantage of observing the demeanor of the witnesses in giving their evidence. This feature can never be reproduced on the argument of an appeal. The rule is well settled that when there is a conflict in the evidence upon material points, and when the truthfulness of witnesses on one side or the other is involved, the verdict of the jury will not be disturbed on appeal (*Mouse v. Sherrick*, 63 *Barb.* 21; *Beckwith v. N. Y. Central R. R. Co.*, 64 *Barb.* 299).

If there was any interest in the plaintiff in the contract it was latent, as neither upon the face of the same, nor in the assignment thereof, was any such interest disclosed.

The assignment from Hazewell to Genet shows no trust, nor does it therein appear that the same was made for a nominal consideration only. The large consideration, expressed in the paper to have been paid on this assignment, left no room on the part of any one to presume that Genet held it in trust for any one or any person. The re-assignment from Genet to Hazewell was unqualified in its terms, and in itself contained no notice that Hazewell was not the equitable as

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well as the legal owner of the same, or that the same was clogged in his hands, with any right or interest in any one, which limited his power to dispose of the same as he pleased. The plaintiff's principal witness to establish by parol evidence the secret trust in her favor, as well as the terms and conditions of the transfer to the defendant, was evidently discredited by the jury, who either failed to discover from the evidence any interest in the plaintiff to be protected, or any excess of authority on Hazewell's part in selling and assigning same; a risk which parties must always assume if they resort to such exceptional methods of creating and protecting right, the disposition of which is well left with the jury.

The result reached is that the judgment and order appealed from is affirmed with costs.

SPEIR, J., concurred.

JOSEPH B. HEISHON, PLAINTIFF, APPELLANT
AND RESPONDENT, v. THE KNICKERBOCKER
LIFE INSURANCE COMPANY, JOHN A.
NICHOLS AND CHARLES M. HIBBARD, DE-
FENDANTS, APPELLANTS AND RESPONDENTS.*

I. PARTIES, EXAMINATION OF.

1. *Before complaint served.*

(a) AFFIDAVITS, SUFFICIENCY OF. 1

1. When they *indicate* that the examination may be necessary

* NOTE.—It is understood that the court of appeals has reversed the order directing an examination, upon the ground that the court at special term has no power to make such an order; and that it can only be made by a judge. This point was not raised at general term. Vide *Albany Law Journal*, vol. 19, p. 458.

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to enable the plaintiff to give formal expression to the allegations which must in the end constitute his complaint, they are sufficient.

2. FULLNESS OF STATEMENT OF CAUSE OF ACTION, EFFECT OF.

(a) Does not establish no necessity for an examination, when.

Before VAN VORST and SPEIR, JJ.

Decided March 8, 1879.

This was a motion noticed for and made at special term, for the examination of defendants Nichols and Hibbard, and an inspection of the books of the company, before service of the complaint, for the purpose of enabling the plaintiff to make and serve his complaint.

The application was made on the petition of the plaintiff, the affidavits of James F. Emery, Mark Uhl, Joseph H. Wells, and of plaintiff, and the annual reports of the company from 1867 to 1876, both inclusive, which reports are not contained in the appeal book, but which were read, according to plaintiffs' points, to show a deficit of over \$2,286,000 in the financial management of the company, and an unlawful disbursement of over \$5,049,000 in canceling and reducing the amount and number of the company's risks.

In opposition to the application, the affidavit of Charles M. Hibbard was read.

The affidavit of Emery set forth that he was the plaintiff's agent in the matter of this action, and made the affidavit on his behalf; and alleged:

"This action is brought as well for the benefit of the plaintiff as of all other policy-holders of said corporation similarly situated, who may come in and contribute to the prosecution hereof and become parties hereto.

"The nature of the action, the substance of the

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cause of action, and the nature of the judgment which will be demanded herein, are as follows, substantially :

“The plaintiff claims, and in his complaint will aver, that the transaction hereinbefore set forth of the procuring from him of the surrender and cancellation of his said four policies, and the inducing of him to accept said three new policies, in exchange therefor, was a fraudulent transaction, by reason of its having been a part and parcel of the said fraudulent and unlawful ‘scheme’ for ‘twisting’ policies, and of its having been made by said defendants part and parcel of the said wrongful conspiracy and combination, and by reason of the wrongful extortion and procurement from him of his said note for \$167.67, and by reason of the said false and fraudulent pretenses and representations, made to him, to induce him to enter into such transaction, and by reason of its having been a breach of trust on the part of said defendants ; said plaintiff will further claim and allege, that he was and is entitled to vote as a corporator, by reason of his rights as a policy-holder, in the election of directors ; also, that the entire assets of said corporation, which amounted to over \$7,000,000 at that time, *were held in trust* for the plaintiff, and all other policy-holders, at all times since the date of plaintiff’s policy first above mentioned ; that his said four policies were mutual, or participating policies, and entitled to share in all the profits of said corporation ; and that, by reason thereof, said plaintiff was and is, at any time, entitled to an accounting of the business and affairs of said corporation, and entitled to demand and have all rights and remedies, incident to the visitorial powers of a court of equity, over all trust relations and trust estates ; and that said defendants were and are the *trustees of the plaintiff*, as a policy-holder in said corporation.

“Plaintiff will also claim and aver in his complaint

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herein, that said individual defendants, and divers other persons unknown to me or the plaintiff, have, at divers times since the issuing of plaintiff's policy first above mentioned, diverted, misappropriated and converted to their own use large amounts of money belonging to said corporation, and forming part of the said trust estate; that illegal dividends have been made, from time to time, to stockholders of said corporation, who were and are unknown to me, or the plaintiff; and that said corporation, by and through its board of directors and its officers, has done and committed divers acts and things which were illegal and in excess of the powers of said corporation, thereby working a forfeiture of its charter. Said plaintiff will claim and aver that he was deceived in said transaction; that he released and surrendered his said four policies, and gave said note and accepted said new policies, while wholly ignorant as to the value of his said old policies, and of the true amounts of the dividends, or profits, which stood to their credit on the books of the company; and as to the true position of the company as to financial solvency and prosperity; and as to the correctness of the computations upon which said surrender and changes were made; and as to the justice or necessity of his giving and paying said note; and also as to all other material facts touching the said transaction; and that he had no sufficient knowledge of the true nature of the transaction, or of the fraud so practiced upon him, until about November, 1877.

"Said Heishon will further allege and claim, that he paid certain premiums on said new policies; and that he was and is, on an accounting, entitled to certain large dividends and profits upon his said old policies; and that there will be found due to him, by and in said corporation, sufficient amounts to pay and cancel all the premiums which have become due and are unpaid, if any, on said old policies: and that he is en-

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titled to a rescission of said transactions, and to pay up all premiums which may be found due from him on a restoration of said old policies.

“The judgment or decree demanded herein will be for a cancellation and rescission of the whole of said transactions with him ; the cancellation of said three new policies, and the restoration and reinstatement of the said four old policies to their position prior to such surrender, and the restoration of said plaintiff to all his rights, as they existed under said four old policies; and for an accounting as to the profits or dividends lawfully due or belonging to said four policies and each of them ; and for a general exhibit and accounting of the management of the affairs of said corporation ; and for a restoration and return by the officers and stockholders of said corporation, and by said defendants, Nichols and Hibbard, of all moneys wrongfully received or used, or misapplied by any or either of them, out of said trust funds, or in any manner in connection with the business of said corporation, or any of the matters aforesaid ; and for the right, on such account being taken, to pay up any premiums which may be found due by said plaintiff, to said corporation, and to continue said old policies thereafter in full force and effect ; and for such other, or such further relief in the premises, as to the court may seem proper ; and for the appointment of a receiver, to continue hereafter the regular business of said corporation, and for the cancellation and retirement of the entire guarantee capital of said company, if the same shall seem to be necessary to insure its future solvency.

“For the purpose of enabling the plaintiff to make and serve his complaint herein, it is necessary to take the examinations or depositions of said defendants, John A. Nichols and Charles M. Hibbard, individually, and of the said John A. Nichols, as the president, and on behalf of said corporation, touching the mat-

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ters hereinbefore set forth, to wit: To examine said corporation, by and through its said president, as to all facts relating to the said policies, old and new, so issued to said plaintiff; the said surrender thereof by said plaintiff; the amount paid or allowed to plaintiff for the same; also the facts touching the carrying out of said scheme; the number and amount in the whole, of all such surrenders or changes, and the nature thereof; the surrenders themselves, signed by the policy-holders; the names of the stockholders of said corporation, the amounts of stock held by them respectively, that they may be made defendants herein, if the plaintiff be so advised; whether or not any dividends or profits have wrongfully accrued or been paid to any person, and to whom, in the course of the business, and out of the funds of said corporation, since the dates of the plaintiff's said four old policies; all of which matters will appear in and by the books, records and papers of said corporation, and which are within the knowledge and under the official control of said John A. Nichols, as such president.

"To examine said Nichols individually, as to what, if any, amounts of money, dividends, or profits, he has made or received, out of and by means of the said unlawful acts and matters hereinbefore set forth, either as an officer, employee, or stockholder; and as to his knowledge of the said wrongful acts of said Hibbard; and when such knowledge was acquired.

"To examine said Hibbard as to the wrongful acts and matters hereinbefore set forth and charged to him personally, as to the true mathematical calculations and values relating to said four old policies, for all the purposes aforesaid; as to the extent and number of the said false records, so alleged to have been made by him; and as to the false or other entries made in connection therewith, in the books of the said corporation, so far as he knows the same; and as to the use made

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by him of said note of \$167.67, and whether or not, he, or any other person, and who, received or used the proceeds thereof; and as to what amount of money he wrongfully exacted or received from myself in connection as aforesaid with my said employment, and what use he made of the same; and whether or not he paid the same over to said corporation.

"I further aver, that said corporation has been requested to produce, or to allow an examination of, the plaintiff's release, or releases, of his said four old policies; and I am informed that it has refused to grant such request; and that it is necessary that each of said twisted policies, and the releases thereof, be exhibited to plaintiff's counsel to enable the plaintiff to make his said complaint; and I ask, on behalf of said plaintiff, that an order be made, directing said defendants to be examined as herein set forth, and according to law and the practice of this court; and directing said corporation to deposit with the clerk of this court all the said twisted policies (517) whose numbers are given in 'Exhibit A,' forming part of this affidavit, and the releases thereof, on or before the day fixed for such examinations, that the plaintiff and his attorney may inspect and copy the same for the purpose aforesaid."

Prior to the statements above extracted, the affidavit had in substance set forth that said company was organized on a basis of a guarantee capital stock of \$100,000, divided into \$25 shares, with power to increase; that by its charter, and various amendments thereof, the owners of the guaranteed capital were entitled to an annual interest of seven per cent. and to twenty per cent. of the net earnings, the remaining profits to be divided equitably among those policy-holders whose policies were issued on the mutual or participation plan; and each insurer to whom profits should be apportioned was entitled to

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one vote under certain conditions, at each election of directors; and the business of the company was placed under the control of a board of directors, one-half of whom were required to be stockholders, and the remainder might be chosen from among the insurers for life; and it was provided that the business of the company should be conducted on the mutual principle, but that any person might obtain insurance without participation in the profits.

It had further set forth that the business of the company had been almost wholly conducted on the mutual principle.

It had further set forth that prior to October 24, 1866, the company had issued to the plaintiff on his four several applications its four several policies, by each of which, in consideration of certain payments to be made, it insured the plaintiff's life during the whole continuance thereof, in the sums in said policies mentioned (to wit: \$1,500, \$2,000, \$1,500, \$5,000), upon certain terms and conditions *which the affiant was unable to specify, the policies being in possession of the company.*

It had further set forth that plaintiff had kept and performed all the terms and conditions of said four policies to be by him kept and performed, until November 21, 1873.

It had further alleged as follows: "Said plaintiff has informed me, and I verily believe from such information, and from the nature and circumstances of the transactions hereinafter named, that said plaintiff is not sufficiently familiar with the facts, and has not the requisite knowledge, or information, touching all the matters herein referred to, to enable him to make this affidavit, or to make and serve his complaint in this action, nor does he know the sources of such requisite knowledge or information from which the same can be obtained, nor do I myself, except as herein set forth."

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It had then further alleged that about February 1, 1873, the company employed the affiant to obtain from the holders of old policies on which a large liability had accrued, and as against which the company was required by law to keep safely invested a large reserve, and to obtain from the holders of premium loan, or note, policies, the surrender and cancellation of the same, and to induce them to accept in exchange therefor new policies, to be issued at the advanced ages of the insured, and at the increased rates of premium required at said advanced ages; and also employed the affiant to purchase outstanding policies for amounts considerably less than the legal reserve required to be kept thereon; it had further alleged that the affiant was so employed for the purpose of carrying out an extensive scheme of procuring the cancellation of said old policies by means of fraudulent concealment of facts, and false and fraudulent statements, and had set forth the general character of the concealments and misrepresentations to be adopted. It had then averred that said scheme was adopted mainly under the management and direction of defendants Nichols and Hibbard, and that the affiant was employed at the instance of said Nichols for the express purpose of carrying out such scheme, and then proceeded: "The object of such scheme was, and my instructions were, by the means aforesaid, and by all or any means, to induce as many as possible of the policy-holders of said company to surrender and cancel their policies, the effect of which would be, and was, *very greatly to lessen the apparent 'liabilities' of the company*, at least to the extent of the 'reserve' set free, or liberated, by the process of cancellation of policies, less the expenses and allowances; also to get rid of a large amount of premium notes and loan notes; also to acquire a large amount of *apparently new business*; and also to wrongfully and unlawfully make and acquire a large amount of apparent profits,

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out of which large dividends of money or scrip could be wrongfully and unlawfully made, to and for the owners of the said guarantee capital."

It had then further set forth that during the employment of the affiant, he and his assistants had obtained, in the manner and for the purposes aforesaid, the cancellation of one thousand policies or more, and then proceeded to allege: "I cannot give an exact estimate, or statement, of the precise extent of my services, or make any exact estimate of the gain or profit to said company, or to its stockholders, or to said defendants personally, for the reason, that shortly after the termination of my said employment, my desks, which contained the books, papers and records connected with my said business and employment, and nearly all of my private books and papers, and which were in the rooms used by myself and my assistants, and in the building of said corporation occupied by it for its offices, *were wrongfully broken open, and said books, records and papers taken, or stolen therefrom*, and I have never since seen them, or been able to obtain them; and I verily believe that they were so taken by said defendant, Charles M. Hibbard, and one Upson, then and now chief bookkeeper of said company."

It had then further set forth that in the course of the affiant's employment, he had instructed various local agents of the company located in different parts of the country in the "method and mysteries" of obtaining cancellations of policies, and on information and belief, that subsequent to his employment the said scheme was extensively prosecuted by many, if not all, the agents of the company.

This affidavit then proceeded as follows:

"From all the facts and information herein alleged, I verily believe that a very large amount of money—many hundreds of thousands of dollars—of wrongful or illegal profit or gain resulted to the company, and

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to all the stockholders thereof, by means of the adoption and prosecution of said alleged scheme.”

It had then set forth, on information and belief, that defendant, Nichols, owned a majority of the guarantee capital, and was thereby enabled to, and in fact did, exercise absolute control of the management of said company, and that he had thereby wrongfully and inequitably acquired enormous profits for himself and fellow stockholders, to the great detriment of the policy-holders. It had further set forth that defendant, Hibbard, during the time of the affiant's employment, had been, and still was, the actuary of the company, on a fixed salary. It had further alleged that Hibbard had informed the affiant that said Nichols (who, prior to being the president, had been vice-president of the company) had, previous to his vice-presidency, been general manager of the company for the Southern territory, and had accumulated a large business; and, in view of negotiations for the purchase by the company of his renewal interest in that business, he, Hibbard, at the request of said Nichols, had given a double valuation to such interest, and that such interest had been purchased by the company for a large amount. It had further set forth that in obtaining the surrender of old policies, the affiant and his assistants in nearly all cases obtained the necessary signatures to surrenders on the back of the policies without filling in the blank left for that purpose the consideration for the surrender, and that such blanks were afterwards, in some instances, and at least twenty-five, filled up by Hibbard with different and larger amounts than the true ones; that the affiant believed such to be the practice of Hibbard in most cases; that he, the affiant, called said Nichols' attention to this practice of Hibbard, and exhibited to him papers sustaining the allegations as to the practice of Hibbard in this respect, but that Nichols never, to the affiant's

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knowledge, took any action in that behalf against Hibbard. The affidavit had then further alleged: "I further state from the fact of said Hibbard's falsifying, as aforesaid, the said surrenders, and the same having been brought, as aforesaid, to the knowledge of the defendant Nichols, and no action having been taken thereon against said Hibbard, there is good reason to believe, and I do believe, *that said individual defendants combined and conspired together to cheat and defraud the said policy-holders*, by means of said 'scheme,' and by false records and papers, and by causing the books of said corporation to be falsely kept, and thereby to obtain for their own use and benefit large illegal gains."

The affidavit had then alleged that plaintiff, in pursuance of said scheme, was induced by one of the affiant's assistants named E. H. Nichols, to surrender his four old policies and to accept new ones at his then advanced age, and at largely increased rates of premiums for the kind of policies issued; that, as the affiant was informed and believes, such surrender was induced by the fraudulent and false representations of facts in the manner and of the character in the affidavit thereinbefore set forth, and by the assurance, contrary to the fact, that he, the plaintiff, was receiving as large an allowance for his old policies as he was equitably entitled to.

It had then alleged that plaintiff was required, as part of the transaction, to give his note at ninety days to the affiant's order for \$167.67; that said note was required to be given by said Hibbard, and was procured by him to be discounted by his brother-in-law, Charles H. Brinkerhoff, and that, as affiant believed from the aforesaid facts, the proceeds of the discount were appropriated to the use of said Hibbard, if not to both Hibbard and Nichols.

It further alleged that plaintiff's original policies,

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with the surrender thereof, having the consideration left in blank, were delivered to the company.

It then proceeded as follows :

"Said note is now in my possession, as are also the four policy slips, made for said four old policies ; but neither myself nor said plaintiff, as he informs me, can now recollect the exact terms of said transaction, or change of said four policies, nor can I recollect the amount falsely filled in in this case by said Hibbard in plaintiff's surrender, but he did fill the same up with a false amount ; nor do I know what entries, or whether true or false, have been made touching such transaction in the books of said corporation, nor does the plaintiff have knowledge, as he informs me, nor have I myself the requisite knowledge of the necessary facts upon which to make and serve a complaint in this action ; nor do we or either of us know of any source from which the requisite knowledge or information of all such necessary facts can be obtained, other than from an examination of the said individual defendants, and of the said company."

Then came the above extracted statement of the nature of the action, of the substance of the cause of action, of the nature of the judgment to be demanded, and of the information desired to be obtained from Hibbard and Nichols, and by an inspection of the books. The affidavit also contained allegations as to Hibbard's extorting large sums of money from the affiant in connection with said business of changing policies.

The affidavit of Uhl corroborated that of Emery, as to the modes and manner in which surrenders were obtained, and as to the procuring of signatures to surrenders having the considerations left blank ; and averred that he, the affiant, was instructed by Hibbard so to procure the signatures ; it also averred that Hibbard instructed him to make false representations of the

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nature and character set forth in Emery's affidavit, and instructed him to make any and all representations which should be necessary to obtain said surrenders; the affidavit further averred that there was not a single case of change with which the affiant had any connection, wherein the just and lawful rights under the surrendered policy were received by the assured. It then proceeded as follows: "*As matter of business honesty, our only justification, in our own minds, as agents, was that we were assured, and I was assured by Mr. Hibbard, that the method adopted for disposing of the old policies, as set forth in said Emery's affidavit, was absolutely necessary to save the Knickerbocker from bankruptcy.*"

The affidavit of Wells set forth that he was Emery's assistant in procuring changes of policies, and that of his own knowledge the statements contained in said Emery's affidavit, relating to the nature of the business done, the manner in which it was done, the instructions given by Hibbard in relation to the mode of doing the business, and the compliance with such instructions by himself, or by Emery and his other assistants, to the best of his information and belief, are true.

The plaintiff's petition and his affidavit was as follows:

"I, *Joseph B. Heishon*, being duly sworn, do depose and say: I am the plaintiff in this action; I have heard read the annexed affidavit of *James F. Emery*, and know the contents thereof. Said *Emery* is my agent, as alleged; and all facts and information and statements in said affidavit, alleged to have been stated, given and made by me, were so stated, given and made. It is true that I do not possess the requisite knowledge or information of facts, as therein alleged, to enable me to make my complaint in this action. It is true that I was induced, as therein alleged, to surrender my four old policies by the said *E. H. Nichols*,

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acting as agent of the said Knickerbocker Life Insurance Company, and to accept three new policies, and pay the premiums thereon, and to make, deliver, and afterwards to pay the note of \$167.67, in the manner, for the purposes, and by means of the fraudulent concealment and misrepresentation of material facts, as in said affidavit alleged. All the allegations contained in said affidavit touching any acts or doings of mine, relating to the nature and the object of this action; the nature of my cause of action herein; the character of the judgment and relief which I shall seek herein, and the necessity for the examinations and disclosures of books and papers as therein set forth, are true. Said E. H. Nichols came from New York to Salem, N. J., then my residence, for the express purpose of obtaining my surrender of my said old policies. He labored faithfully with me during two days to obtain my consent thereto. I was very reluctant to assent to his proposals; I could not then understand how it could be to my interest or benefit to do so; said Nichols represented to me that it was decidedly to my interest to do so, and the company would, and did, allow me, in the transaction, more than I was justly or equitably entitled to. I do not now recollect the precise allowance made to me, or the exact figures involved in the transaction; I was ignorant then, and until November, 1877, of the nature of the transaction, of the existence of any general scheme for purchasing, or obtaining surrenders of the policies; also ignorant of the mathematical nature of the life insurance business, and of the value of my old policies, and of the 'surrender value' thereof, and of the 'reserve' accumulated thereon, and of the financial standing and condition of the Knickerbocker, and of the real object and purpose of its officers in obtaining said surrenders, and of all other material facts set forth in said affidavit, and the same were falsely and fraudulently misstated and mis-

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represented by said E. H. Nichols to me ; but whether knowingly done on his part personally, I cannot state. I do not think that he personally knew all the wrong he was instrumental in effecting."

" To the Honorable, the Superior Court of the City of New York, and the Justices thereof :

"The petition of Joseph B. Heishon, plaintiff above named, shows to your honorable court :

"That the nature of the above entitled action, and of the cause of action herein, and of the judgment and relief sought herein, are correctly set forth in the annexed affidavits of James F. Emery, and your petitioner ; and the necessity for the production and inspection of the books, records, and papers kept by the defendant, the Knickerbocker Life Insurance Company, is also therein correctly set forth.

"Your petitioner further respectfully shows that it is necessary to have a production and disclosure of the following books and papers, to enable your petitioner to properly prepare and serve his complaint herein, namely :—the original policies, the numbers of which, and the names of the insured in which, are given in the foregoing 'Exhibit A ;' and the agreements or instruments of surrender, or release, of each of said policies, whereby the assured surrendered the same to said corporation ; and the policy-registers, and dividend books, in which were kept the record of said policies and the dividends thereon ; also the cash-books containing the entries made from and after February 1, 1873, of surrender values, payments, or disbursements of money, paid and made upon the surrender of said numbered policies :

"Your petitioner therefore prays, that an order be made herein pursuant to the practice of your honorable court, directing said corporation, and John A. Nichols, the president thereof, and George F. Sniffen, who is the secretary thereof, to deposit with the clerk

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of this court said books and papers, at such time, and under such directions and restrictions, as the court shall fix, in order that the same may be fully and freely inspected by your petitioner's counsel herein, for the purposes aforesaid ; or that said company and its said officers, in such time and manner as the court shall direct, allow a full and free inspection of such books and papers by your petitioner's counsel, and by such assistants as he may properly employ for that purpose, for the purposes aforesaid ; and that your petitioner have such other or further relief in the premises, as to the court shall seem proper ; and your petitioner will ever pray."

The affidavit of Hibbard denied the allegations contained in the affidavit of Emery as to the character of his employment, as to the company's setting on foot a scheme to procure the surrender of policies by any fraudulent concealment or misrepresentation, as to the instruction given with reference to the manner of carrying out any such scheme, as to defendant Nichols acquiring large gains and profits for himself and fellow stockholders and exercising absolute control over the business of the company, as to filling up blank surrenders with any different amount than the true one, as to the exaction of money from said Emery, as to his taking a wrongful advantage of his position or privileges connected with said company ; and set forth that he had no agency whatever in procuring the surrender of plaintiff's policies ; that neither he nor the company required the plaintiff to give any note on such transfer ; that several days after the surrender Emery brought him a note, which he believes to be the one referred to in Emery's affidavit, and requested him procure its discount, which he did through Brinckerhoff, and the proceeds were either paid to Emery or credited to him in account for money owed by him to the affiant.

This affidavit also denied the statements contained

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in Uhl's affidavit, as to instructions given to him, and statements and assurances made to him by the affiant.

It also set forth that the only employment of said Emery was to procure the substitution of a class of policies theretofore and for many years issued by the company, upon which the premium was paid in part by a note made by the policy-holder for the premium due on the policy, and known as a premium note, for policies upon which the premium should be paid wholly in cash ; and in connection with such employment to procure such new insurance as he might be able. It then set forth as follows :

"The business for which said Emery was employed, as aforesaid, was designed by said company to procure the general welfare of its policy-holders as a body, by removing the complication incident to the note system already mentioned, and, in point of fact, resulted in very inconsiderable profit, if any, to said company. That, in the experience of said company, said note system proved very unsatisfactory to its policy-holders ; and the interests of the company and of its policy-holders seemed to the officers of the company to demand a change. That a large majority of the life insurance companies, which have transacted business to any extent upon said note system, at or about the same time when said Knickerbocker Life Insurance Company inaugurated the change aforesaid, had adopted the change instituted by said company, to wit : By changing from the note system to the cash system, with respect to the payments of premiums upon life insurance policies. Said Emery was not instructed by said company, nor expected by it, to offer to policy-holders in the course of his employment as aforesaid, any other than a fair inducement and consideration for changing their policies from the note system to the cash system ; that said consideration and inducement consisted in some cases in returning

Defendants' Points.

to the policy-holder the note held by the company against the old policy, upon which the policy-holder was obliged to pay interest annually, in addition to the premium named in the old policy. Sometimes, in returning the note so held, and paying a portion of the premium on the new policy; in some, in paying several premiums on the new policy; and in some instances, in addition to returning the note and paying one or more premiums on the new policy, the payment of a cash sum to the policy-holder, as the circumstances of each individual case might warrant."

The judge who held the special term granted the motion as to the examination of Nichols and Hibbard, but denied it as to the inspection of the books.

A special term order was entered in conformity with the decision.

Both parties appealed.

Johnson, Cantine & Deming, attorneys, and *Henry W. Johnson*, of counsel, for defendant, upon the questions considered by the court, urged:—I. Assuming that the plaintiff could be entitled to such a judgment from this court as the moving papers state he will ask in his complaint, those papers contain a complete demonstration that no examination is necessary to enable him to frame his complaint as the basis for such a judgment. These averments are complete in themselves, and a motion to make them more definite and certain would not be granted. An examination of the defendants, therefore, could only be necessary to enable the plaintiff to obtain evidence in support of those averments—not to enable him to make them.

II. The fifth point of the learned counsel is a virtual concession that Emery's affidavit discloses all the facts necessary to enable the plaintiff to frame his complaint; but, while conceding this, the plaintiff

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claims an examination of the defendants, because he does not believe what Emery swears to. This is the proposition plainly deducible from the argument of the learned counsel. "Emery's affidavit does not satisfy the conscience of the plaintiff, so far as to warrant him in swearing to a complaint, in which he must aver a belief in the information." Thus the learned counsel puts his client in this remarkable attitude before the court—that he has selected an agent to prosecute his claim who has made oath to certain facts, but the plaintiff himself does not believe them to be true.

W. J. Butler, attorney, and of counsel, for plaintiff, as to the questions considered by the court, urged :—V. Defendants claim that plaintiff has shown that he needs no examination to enable him to frame his complaint. It is necessary to present a case showing the substance, if not all the particulars of a perfect cause of action ; the order could not otherwise be granted ; but it shall not therefore be objected that no examination is necessary because Emery's affidavit shows the substance of a cause of action ; and, besides, Emery's affidavit does not satisfy the conscience of the plaintiff, so far as to warrant him in swearing to a complaint, in which he must aver a belief in the information.

There were other points raised by counsel, which the court deemed it unnecessary to pass on.

BY THE COURT.—VAN VORST, J.—The proceeding before the judge at special term was a petition on the part of the plaintiff, accompanied by affidavits requiring the defendants, Nichols and Hibbard, to appear and be examined, for the purpose of enabling the plaintiff "to make and serve his complaint," and also

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for an order requiring the defendant corporation, its president and secretary, to deposit, with the clerk of this court, certain of its books and papers, containing entries during several years, in order that the same may be inspected by the plaintiff for the same purpose.

The application for the deposit and inspection of the books and papers was denied by the judge at special term, but an order was made for the appearance of the defendants to be examined. The plaintiff's need, out of which these proceedings originated, is by himself limited. If there was no such need existing, both applications should have shared the same fate.

It is urged, by the counsel for the defendant, that the plaintiff's affidavits show him to be in possession of all the facts necessary to prepare his complaint. In substance the same objection was urged, without avail, in *Glenney v. Stedwell* (64 N. Y. 120, 128).

It is true the plaintiff is in possession of facts and information, as appears by his affidavit, sufficient to indicate that he is entitled to relief of some character in a court of equity.

Subdivision 2 of section 872 of the Code of Civil Procedure calls upon the plaintiff to show, in his moving papers, the nature of the action, and the substance of the cause of action, and of the judgment demanded therein. This he has done to a marked degree.

But plaintiff claims that the defendants, Nichols and Hibbard, are in possession of facts which will enable him accurately to state his cause of action with the fullness of detail necessary to be stated in a complaint for equitable relief, where transactions of the character of those indicated in the plaintiff's moving papers are to be investigated.

This action is unusual and peculiar as to character. The relation of the defendants to the company, and their alleged participation in the transactions of which

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complaint is made, clearly enough indicate that their personal examination may be necessary to enable the plaintiff to give formal expression to the allegations which must, in the end, constitute his complaint, and upon which the ultimate relief to which he may be entitled, and the extent thereof, in so far as the complaint can disclose the same, must be based.

We would give no license to any vexatious inquiry into the affairs of these defendants in their relations with the company, not connected with a statement of the plaintiff's cause of action, nor would we place them under any unnecessary burden, nor subject them to an examination to ascertain whether the plaintiff has a cause of action. The statute and the power of the court can be invoked for no such purpose.

A cause of action is set up, and the inquiry should be limited to such matters only as are necessary to enable the plaintiff to prepare his complaint.

As the plaintiff may be limited on the trial to the allegations of his complaint, and his relief, in substance, be restricted thereby, it is proper, it seems to us, that in order to widen the range of inquiry, and to enable the plaintiff to demand the additional relief indicated by the facts and knowledge alleged to be in the possession of these defendants, and which are essential to be stated in the complaint, and cannot be otherwise obtained, that they should submit to an examination.

The judge before whom they are to be examined will see to it, that the inquiry is confined within proper limits.

We think the order for an examination of the books was properly denied, but the order for the defendants' examination is affirmed.

Both orders are affirmed with costs.

SPEIR, J., concurred.

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**ALBERT G. HYDE, PLAINTIFF AND APPELLANT,
v. EDWIN O. TUFFTS, DEFENDANT AND RES-
PONDENT.**

TORTS.—CHOSER IN ACTION, ASSIGNABILITY OF.

A cause of action in tort, affecting the property rather than the person of the claimant, may be bought and sold.

In this case, plaintiff was induced by the fraudulent statements of the defendant to enter into a copartnership with him, and to contribute a large sum as capital thereto, which sum was lost to plaintiff by defendant's said deceit and subsequent fraudulent acts. Afterwards, and prior to the commencement of this action against defendant for deceit, plaintiff petitioned for and obtained a discharge in bankruptcy.

Held, that upon the above facts action cannot be maintained by plaintiff; that whatever claim he may have had against defendant passed by the assignment to his creditors, as an asset.

Before VAN VORST and SPEIR, JJ.

Decided March 3, 1879.

Appeal from an order vacating an order of arrest.

On May 1, 1875, the plaintiff was induced, through certain representations made to him by the defendant, which were false, to enter into copartnership with him. These representations were in respect to the value of the defendant's business, and the amount of capital and moneys he had invested therein, and as to the extent of his liabilities. The defendant had kept his books falsely, so as to exhibit such facts. The truth being that the defendant did not have the capital and money in his business he so represented, and his indebtedness was largely in excess of the amount he stated. He was in fact hopelessly insolvent. Relying upon the truth of the representation, the plaintiff paid into the copartnership \$44,250 in cash. The copart-

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nership continued but a short time, but during its continuance the defendant kept the books falsely, so as to continue the frauds, and used, for his own personal purposes, the moneys which had been contributed by the plaintiff, and which, through the defendant's deceit, have been lost to the plaintiff.

The above facts, appearing by affidavits on the plaintiff's behalf, an order for the arrest of the defendant and this action, which is brought for the recovery of the plaintiff's damages, was made, which was subsequently set aside.

It appeared before the judge who set aside the order of arrest, that the plaintiff was, on his own petition, in the year 1877, adjudged a bankrupt, and had been discharged by the decree of the Federal court from his debts. That in such proceedings an assignment had been executed to the assignee in bankruptcy, of all the estate and property of the plaintiff; and that the assets in the hands of the assignee were insufficient to pay the plaintiff's creditors.

The plaintiff appealed from the order vacating the order of arrest.

Stickney & Shepard, attorneys, and *Edward M. Shepard*, of counsel, for appellants.

Martin & Smith, attorneys, and *A. Pennington Whitehead*, of counsel, for respondent.

BY THE COURT.—VAN VORST, J.—The learned counsel for the plaintiff urges that the cause of action originated in the defendant's deceit, and not being assignable, did not pass to the assignee in bankruptcy.

He would, in substance, place the plaintiff's cause of action in the same category with personal torts, such as slander and assaults, which do not pass to the personal representatives of the person injured, but die with his person.

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It has been held that a cause of action arising in a tort, although it affected property, was not assignable. In *Gardner v. Adams* (12 *Wend.* 297) it is said, that a cause of action for a conversion of personal property is no more assignable than one arising out of an assault upon the person. But *Hall v. Robinson* (2 *N. Y.* 295) comments upon *Gardner v. Adams*, and holds differently with respect to such a chose in action.

In *Hoyt v. Thomson* (1 *Seld.* 320, 347) this subject is discussed by PAIGE, J. He says: "All choses in action, embracing demands which are considered as matters of property or estate, are assignable, either at law or in equity. Nothing is excluded but mere personal torts, which die with the party. A claim, therefore, for property fraudulently or tortiously taken or received, or wrongfully withheld, and even for an injury to either real or personal property, may be assigned."

This case points out the true line of demarcation in general terms, between causes of action originating in torts, which may and may not be assigned.

HARRIS, J., in *Hodgman v. Western R. R. Co.* (7 *How. Pr.* 494), is quite clear and distinct upon this subject. "Every right of action involving life, health or reputation," belong to a class which cannot be assigned.

But when it affects "the estate, rather than the person," the right of action may be bought and sold. And he adds: "Such a right of action, upon the death, bankruptcy or insolvency of the party injured, passes to the executor, or assignee, as a part of his assets, because it affects his estate, and not his personal or relative rights."

These authorities make the proper disposition to be made of this case reasonably clear, notwithstanding the cases cited by the learned counsel for the plaintiff,

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principally, however, from other States. He refers us to *Sommer v. Wilt*, 4 *Serg. & R.* 19, 28; *Shoemaker v. Keely*, 2 *Dall.* 213; *O'Donnell v. Seybert*, 13 *Serg. & R.* 54; *Read v. Hatch*, 19 *Pick.* 47; *Henshaw v. Miller*, 17 *How. U. S.* 212, as holding in substance, that in order to a survival of certain actions, arising *ex delictu*, the injury must be actual and direct to property, and not indirect and incidental, and that a cause of action arising through deceit and fraud would not survive. However it may be elsewhere, the rule, in this respect, as laid down by our own courts, must prevail.

Although it is quite clear that the plaintiff was induced, through the defendant's fraudulent statements, to become his partner, and place his money within his reach and disposal, yet it is equally clear that it was the defendant's purpose, through the deceit, to reach the money.

The injury to the plaintiff affected his property rather than his "personal or relative rights."

And this money, which the deceitful representations were designed to secure, the defendant, according to the plaintiff's showing, has in fact converted and applied to his own advantage. The fraudulent representations were designed to, and did, in fact, despoil the plaintiff of his estate, to the immediate and direct pecuniary advantage of the defendant. Through the fraud the plaintiff's money passed from himself to the defendant.

In case the plaintiff had died before going into bankruptcy, we think it clear that the claim would have passed to his personal representatives, and could have been enforced by them (2 *R. S.* 447, §§ 1, 2).

Doubtless, had the defendant, through fraudulent representations, obtained the plaintiff's horse, an action for its recovery, or for damages, would have passed to his personal representatives or assigns (*McKee v. Judd*, 12 *N. Y.* 622; *People v. Tioga Com-*

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mon Pleas, 19 *Wend.* 73; *Hawk v. Thorn*, 54 *Barb.* 164).

We cannot perceive that it changes the case, where the object sought to be secured by the fraud is money rather than ordinary chattels.

It is urged by the counsel for the plaintiff that *Zabriskie v. Smith* (13 *N. Y.* 322) is an authority against the assignability of the plaintiff's cause of action. I do not think so. In that case there was a fraudulent representation as to the solvency of a third person, who obtained the property and reaped the immediate benefit.

That was also the point in *Read v. Hatch*, and *Henshaw v. Miller* (*supra*).

But that is not the case we have under consideration.

Here the deceit perpetrated by the defendant was to get into his possession and under his control, for his own advantage, the plaintiff's property, and his fraud was successful. It would, indeed, present an anomalous case if the plaintiff, ruined by the defendant's fraud, and having been discharged in bankruptcy, through his inability to pay his debts, should now be allowed to recover to his own use the moneys he paid into the copartnership which became insolvent, and leave his creditors helpless and without remedy.

Both law and equity are well satisfied when this chose in action, representing the plaintiff's despoiled estate, passes to his assignee in bankruptcy, as we are of opinion it does, under the revised statutes regulating the assignment of the property and estate of the bankrupt, to be enforced for the benefit of his creditors.

The order appealed from is affirmed with costs.

SPEIR, J., concurred.

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**MARY E. SNIFFEN, PLAINTIFF AND RESPONDENT,
v. BERNARD KOECHLING, DEFENDANT AND
APPELLANT.**

**USURY, WHAT DOES NOT CONSTITUTE IN MORTGAGE.—PRACTICE AS
TO REQUESTS TO FIND, &C., SUBMITTED AT TRIAL, UNDER SECTION
1023, CODE CIV. PRO.**

The employment of an agent to effect a loan does not impliedly or apparently authorize him to do an illegal act, and where a lender has received a security providing for the repayment of the precise amount loaned by him, with legal interest, the fact that the agent, without the authority, knowledge or participation of the lender, extorted from the borrower a bonus, does not taint the transaction with usury (*Esteves v. Purdy*, 66 *N. Y.* 446; *Bell v. Day*, 32 *Id.* 165; *Condit v. Baldwin*, 21 *Id.* 219; *Elmer v. Oakley*, 3 *Lans.* 34).

The written statement of facts deemed established by the evidence, and the rulings of law desired thereon, which, under section 1023 of the Code of Civil Procedure, a party may submit to the judge at the trial, must, to be considered, be in the form of distinct propositions of law or of fact, or of both, separately stated; and in the same propositions should not be mingled indiscriminately statements of fact with conclusions of law. They must be prepared in such form that the court may conveniently pass upon them.

Before VAN VORST and SPEIR, JJ.

Decided March 3, 1879.

This action was brought for the foreclosure of a mortgage.

The answer of the defendant set up: 1st, usury; 2d, that one Anthon was agent and attorney for the plaintiff in and about the making of said loan; and that the plaintiff had, through such agent, required as a condition of making the loan to pay over to her the sum of \$1,433.66, which the plaintiff was to apply to

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the payment of taxes and assessments on the mortgaged premises.

The defendant further alleged that he advanced this money to said agent for such purpose, but that the plaintiff never applied the money to the payment of such taxes and assessments, and that plaintiff applied the same to her own use. For this amount the defendant demanded a recoupment.

A reply was put in by the plaintiff in which she denied that Anthon was her agent, or that any of this \$1,433 had been advanced to her, or at her request, and that she was in no wise responsible for the action or conduct of Anthon.

Plaintiff recovered judgment of foreclosure, from which, and from the direction or order as to his requests to find, defendant appealed.

The facts are stated in the opinion of the court.

Theodore F. Sanxay, for appellant.

C. A. Runkle, for respondent.

BY THE COURT.—VAN VORST, J.—I cannot think that the retention by Anthon of a portion of the moneys handed to him by the plaintiff's agent on the purchase of the mortgage, or making of the loan, however we may call it, and the subsequent delivery by Anthon to the plaintiff's agent of the sum of \$375, part and parcel thereof, as a commission for his services, he being engaged in real estate business and in the negotiation of mortgages, renders the mortgage void in the plaintiff's hands.

That, under the facts found by the learned judge, and which findings are sustained by the evidence, would be a hard judgment, and would inflict unmerited loss upon an innocent person.

Anthon, who was an attorney and counsellor at law, on behalf of the defendant, who desired to raise a sum

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of money by way of mortgage on his real property, to pay off a previous mortgage thereon, applied to the plaintiff's agent, and attorney, in fact, and whose general vocation was that of broker in real estate and mortgage negotiations, for the loan or advance of the money.

In making such application, and in settling upon the terms and conditions of the loan, Anthon was beyond doubt the representative of the defendant.

It may be that before the matter was fully and completely ended, the plaintiff's agent, to some extent, relied upon the legal knowledge and care of Anthon, with regard to the sufficiency of the papers, and the condition of the title; but that is not inconsistent with the fact that Anthon's true attitude was as the defendant's representative and agent in the substantial parts of this transaction, and by whom he was to be compensated.

The plaintiff was, in truth, represented by her own agent, her son, who, acting under a written power of attorney, was charged with the duty of investing her moneys. I cannot accept the conclusion, however, that the plaintiff, who was wholly ignorant of the private arrangement between Anthon and her agent, and who received no part of the moneys retained by Anthon under the name of commission, or for services, is at all chargeable with anything that was questionable or irregular in Anthon's action, although he divided the commissions or moneys retained with the plaintiff's agent.

She was advised and believed that the whole investment had cost her \$7,500, the face of the mortgage, as it in fact did, for her moneys to that extent were used and charged in her accounts, no portion of which was paid back to or received by her.

If the defendant has any just cause of complaint, it is with the person selected by him to raise the money,

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and to complete the business, against whom, or his personal representatives, redress must be sought. The whole amount was received by Anthon to the defendant's use. That Anthon afterwards paid her agent \$375 cannot prejudice her, unless with her knowledge or assent.

An innocent party cannot in this manner become implicated in the vice of usury.

The employment of an agent to effect a loan does not impliedly or apparently authorize him to violate law, or do an illegal act.

And where a lender has received a security providing for the payment of the precise amount loaned by him, with lawful interest, the fact that the agent, without the authority, knowledge, or participation of the lender, extorted from the borrower a bonus, does not taint the transaction with usury (*Estrevez v. Purdy*, 66 *N. Y.* 446; *Condit v. Baldwin*, 21 *Id.* 219; *Bell v. Day*, 32 *Id.* 165; *Elmer v. Oakley*, 3 *Lans.* 34).

The findings of fact and conclusions of law signed and filed by the learned judge before whom the action was tried at special term, cover all questions necessary to be considered in the just disposition of the action.

We see no error in the refusal of the judge to pass upon the numerous requests presented to him by the defendant, through his attorney, for the purpose of having the same passed upon, pursuant to section 1023 of the Code of Civil Procedure.

This section provides, that either party may submit, in writing, to the judge, a statement of the facts which he deems established by the evidence, and rulings of law, which he desires the court to make.

But the statement must be in the form of distinct propositions of law or of fact, or of both, separately stated. They must be prepared in such form that the court may conveniently pass upon them.

In the same proposition should not be mingled, in-

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discriminately, statements of fact with conclusions of law. Such practice leads to confusion, and makes an intelligent disposition of the subject inconvenient for the judge below, and the appellate court, upon review.

On the other hand, these statements of fact and legal propositions, if handed to the judge before his decision, clear, distinct, and simple in their construction, each confined within its proper limits, when passed upon by him, will aid him in reaching a just conclusion in respect to the principal controversy before him, and will also reasonably guard the rights of an aggrieved party on appeal. A close adherence to this practice must be fruitful of good results. The learned judge refused to pass upon the defendant's requests, or any of them, for the reason that they did not comply with section 1023 of the Code of Procedure, in that the propositions material to be passed upon were so intermixed with statements of specific pieces of testimony and general statements of law, that the former could not be practically distinguished and passed upon.

We have examined these requests, and find them to be largely open to the objection urged by the judge to their consideration. Some of them, it is true, are statements of facts. But in the main the refusal was justified.

In the exceptional instances, however, no practical injustice is done. In the findings actually signed, they are actually disposed of, and the others are immaterial.

The real matters of substance, warranted by the evidence, under the issues, are found by the judge in the statement of facts and conclusions of law actually signed by him, and forming a part of the case on appeal.

We find no substantial error in the various rulings of the judge upon the trial, to which exception has

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been taken. And for the reasons assigned by him, as well as those hereinbefore stated, the judgment is affirmed with costs.

SPEIR, J., concurred.

J. WYMAN JONES, PLAINTIFF AND APPELLANT,
v. GEORGE L. KENT, ADMINISTRATOR, &C., OF
E. ROCKWELL, DECEASED, *et al.*, DEFENDANTS
AND RESPONDENTS.

**SALE OF PERSONAL PROPERTY.—AGREEMENT TO SHARE PROCEEDS OF
RESALE, ABOVE A CERTAIN SUM, WITH VENDOR.**

The following memorandum was signed by the defendant's intestate and delivered to the plaintiff, and forms the basis of this action:

"Received of J. W. J., by agreement, one thousand shares of St. Joe Lead Stock, for which I have paid him \$3,000. The understanding is, that I am to give said J. one-half of whatever price the same is sold for, when sold, over and above that sum."

Held, that the above memorandum is evidence of an *absolute sale* of the property therein mentioned, and that, until the holder of the said property thereunder, who has the sole and exclusive right of disposal, elects to sell the same, the vendor can have no possible claim thereon; that an action to compel the sale of the property, and a distribution of the proceeds, will not lie (*Lorillard v. Silver*, 36 N. Y. 379).

Also held, that to construe the language thus employed as imparting an intention on the part of either party to have the stock and its earnings held or sold for their joint benefit would involve an interpolation of new matter at variance both with the terms and spirit of the contract.

This case distinguished from *Wright v. Wood*, 57 Barb. 471.

Before VAN VORST and SPEIR, JJ.

Decided March 3, 1879.

Statement of the Case.

Appeal from judgment in favor of defendant.

This action was tried by the court without a jury, and was brought to compel the sale and a distribution of the proceeds of two thousand shares of the capital stock of the St. Joseph Lead Company, transferred by plaintiff to defendant Kent's intestate, in June, 1876.

The court below held the following facts to be established by the evidence:

The transfer was made in two separate lots of one thousand shares each, and on each occasion the said defendant's intestate signed and delivered to the plaintiff a written instrument in the following form:

"Received of J. W. Jones, by agreement, one thousand shares of St. Joe Lead Stock, for which I have paid him \$3,000.

"The understanding is, that I am to give said Jones one-half of whatever price the same is sold for, when sold, over and above that sum.

"Dated N. Y., June [], 1866.

"E. ROCKWELL."

Neither of such instruments differed from the other except in its date, one being dated on June 19, the other on June 29, 1866. On May 1, 1868, the defendant's intestate, with the consent, as the complaint alleges, of the plaintiff, surrendered to the company one hundred and forty shares of such stock, and paid it \$600 in cash, receiving in consideration of such surrender and payment two of its interest-bearing bonds for \$1,000 each. Interest was duly paid upon such bonds until their redemption by the company, as hereinafter mentioned. At the maturity of the bonds, in August, 1871, the bondholders accorded to the company an extension of time of payment, and thereupon received, as a consideration for such extension, a divi-

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dend in stock. As the owner of two \$1,000 bonds the defendant's intestate became entitled to and received as such dividend one hundred shares of such stock. At about the time of the transfer by the plaintiff to the said defendant's intestate, the stock sold for and was worth in the market from \$2.50 to \$3 per share. It declined in value shortly afterwards, selling at a very low price, and remained continuously depressed until the spring of 1874, when the payment of dividends was commenced. The stock thereupon rallied and became worth from \$2 to \$3 per share. The defendant's intestate died in February, 1874. Dividends amounting in the aggregate to \$3,206 have since been declared and paid upon the stock held by him at the time of his death. In December, 1875, the two bonds for \$1,000 each, above mentioned, were purchased by the company at ninety-five per cent. of their par value, and accrued interest. At the commencement of this action the stock had attained the value of and is now worth from \$7 to \$8 per share.

The plaintiff claimed that he transferred the said stock to defendant's intestate "in trust for the benefit of both parties;" that it was verbally agreed between them "that said two bonds should stand upon the same footing as the stock, and that plaintiff should be interested therein as in said stock." He further claimed to be, in like manner, interested in the one hundred shares of stock issued to defendant's intestate, as a bonus, upon the extension of time of payment of the bonds, and that such shares were held upon the like trust. He, therefore, demanded judgment, declaring the existence of such a trust in his favor, and directing a sale of the stock, an accounting with respect to such dividends and interest, and a final distribution, according to respective rights and inter-

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ests of the parties, as upon such accounting they shall be ascertained and determined.

No evidence in support of the plaintiff's claim to a beneficial interest in the stock, after its transfer by him, other than such as the two written instruments of May 19 and 29, 1866, may afford, was adduced at the trial; though it was claimed that the surrounding circumstances, as above set forth, require such a construction of those instruments as will fully sustain the claim of the plaintiff in this regard; and it was urged and insisted, that under and by virtue of the instruments themselves, the plaintiff must be deemed to have retained an equitable interest in the stock, and in all profits and advantages accruing therefrom; the relation between the two parties being that of joint adventurers in the transaction.

Knox & Jones, attorneys, and *William Stanley*, of counsel, for appellant.

Porter, Lowrey, Soren & Stone, attorneys, and *Grosvenor P. Lowrey*, of counsel, for respondent.

BY THE COURT.—VAN VORST, J.—We are of opinion that there was an absolute sale of the stock to Rockwell, for the consideration expressed in the written memoranda, and which was paid by the vendee. That feature distinguishes this case from *Wright v. Wood* (57 Barb. 471). In that case there was no sale of the stock to the defendant.

This case, as was suggested by SANFORD, J., below, falls within *Lorillard v. Silver* (36 N. Y. 379), and is decided by it. We are of opinion that the sale of the stock by the defendant, the representative of the vendee, cannot, upon the facts found, be hastened by the plaintiff. The legal title to the shares, with the absolute and exclusive right to dispose of same, passed to

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the vendee, and is not liable to be interfered with by the vendor, as to the time when, or the price at which, the same shall be sold.

The vendee could have sold at any time after he acquired title, had his exigencies demanded it, although he should fail to realize even what he paid for the same, without accountability to the vendor, who could not have been called upon to bear any portion of the loss. On the other hand, the vendee, and those who now represent him, if they concluded it was most prudent to hold the property in the expectation of a further appreciation, should not be restrained from the exercise of their judgment and discretion in that regard.

We should not, through a judicial sale, ordered against the opposition of those who own the stock, frustrate their expectation of a further advance in the value of the property.

We cannot accept the conclusion that Rockwell received or held the stock in trust, and the plaintiff, as a beneficiary, can compel its sale at such time as he may elect. Such trust relation is in direct opposition to the terms of the memoranda made at the time of the transfer, which are clear and unambiguous.

But whenever the holder shall elect to sell, and as to the time, he is to be the exclusive judge, and should there be realized on the sale any sum over and above what Rockwell had for the shares, then and not until then can the plaintiff interpose any just claim, and that for his proportion of the excess.

We cannot perceive that the plaintiff, under the facts found by the judge at special term, is entitled to any accounting with respect to the one hundred and forty shares of stock surrendered to the Lead Company, or the proceeds of the two bonds secured in exchange therefor.

In addition to the surrender of the one hundred

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and forty shares, to which the plaintiff assented, Rockwell paid in money \$600. It is found by the judge at special term that there was no understanding or agreement that the plaintiff should be interested in the bonds, or that Rockwell should hold the bonds upon any trust.

In no event has there been any such sum realized by the defendant as to justify any accounting, by the terms of the memoranda in writing. We find no error in the rulings of the judge at special term ; and for the reasons above expressed, as well as those quite clearly stated in the opinion of SANFORD, J., at special term, the judgment appealed from should be affirmed.

SPEIR, J., concurred.

JOSIAH WALKER, PLAINTIFF AND RESPONDENT,
v. JOHN C. SPENCER, DEFENDANT AND AP-
PELLANT.

DEMURRER TO COMPLAINT, IN AN EQUITY ACTION.

1. That causes of action are improperly united therein ;
2. That plaintiff has an adequate remedy at law ;
3. That the complaint does not state facts sufficient to constitute a cause of action.

This action was brought to compel the defendants to account as the general agents of the assignor of the plaintiff. The complaint, although containing many specific allegations in regard to the matters and business of said agency, in truth sets up but one cause of action, and there is no improper joinder of causes of action, arising out of the agreement, with claims for wrongful conversion, as the demurrer suggests.

A demurrer will not lie to the prayer for judgment in the complaint. That the plaintiff has an adequate remedy at law is no ground of demurrer.

If the complaint sets up a cause of action, the court has juris-

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diction to dispose of a controversy, whether the relief called for be legal or equitable, or both. The forum of the trial, whether before the court or a jury, will be determined when it comes on to be heard.

In the case of agencies, such as the case under consideration, where accounts are involved, an action may be brought on the equity side of the court (*Story's Equity Jurisdiction*, §§ 462, 463, &c.).

This view of the case disposes of the objection, that the complaint does not set up facts sufficient to establish a cause of action.

Before VAN VORST and SPEIR, JJ.

Decided March 3, 1879.

Appeal from an order overruling a demurrer to the complaint.

Hatch & Van Allen, attorneys, and *H. J. Hatch*, of counsel, for defendant.

George W. McAdam, attorney, and *Daniel T. Robertson*, of counsel, for plaintiff.

BY THE COURT.—VAN VORST, J.—The real object of this action, as disclosed by the complaint, is to bring the defendants McDonald and Spencer to an accounting, in respect to their action as agents, under an agreement made by them with the defendant, Josiah Walker, on May 1, 1868.

By this agreement, such defendants were appointed the general agents of Walker, to sell and dispose of a certain article known as "Vinegar Bitters," which was manufactured by Walker.

The agents, McDonald and Spencer, were by the terms of the agreement entitled to commissions for their services, out of the net profits to be realized on all sales, to the amount of fifty per cent. thereof. The

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agents, by force of the agreement, were bound to render accounts periodically.

The complaint, in truth, sets up but one cause of action, although it contains specific allegations with regard to the receipts of large sums of money under the agreement, and their expenditure by the agents, and their acts and omissions, as to the subject-matter. Yet such allegations do not, as is supposed by the defendant's counsel, amount to statements of different causes of action, which cannot be joined in the same complaint, but are all related to the principal matter, and tend more clearly to show that an accounting is proper. By way of illustration, the allegations in respect to the expenditure of a considerable sum of money, by the agents, out of the profits, for advertising, without the assent of the principal, do not, as is urged, disclose a cause of action for the wrongful conversion of the agents' money. The propriety of such expenditure will be ascertained on the accounting, when the same will be scrutinized. For all that was properly expended under the agreement, the agents will be credited; for improper and unauthorized expenditures, they will be charged.

There is, therefore, no improper joinder of causes arising under the agreement, with claims for wrongful conversion, as the demurrer suggests.

Nor does the subject-matter contained in the ninth subdivision of the complaint disclose a separate cause of action against the defendant, Joseph Walker. If it does, its joinder with those for which the other two defendants are jointly liable, would be improper (*Earle v. Scott*, 50 *How. Pr.* 506).

The propriety of the payment therein claimed to have been made will also be determined on the accounting, and as to whether or not it was made after notice of the assignment to the plaintiff. By its prayer for relief, the complaint does, indeed, ask for a judgment

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against the defendant Walker individually, for moneys paid to him by the other defendants after the assignment. But a demurrer will not lie to the prayer for judgment.

If, upon the trial, it shall appear upon the facts proven under the complaint that separate relief as to the defendant Joseph Walker cannot be allowed, it will doubtless be withheld. It is not an unusual thing for a plaintiff to ask, in the prayer of his complaint, relief to which he is not entitled, and which it would be improper to allow.

That the plaintiff has a remedy at law is no ground of demurrer. This court has always jurisdiction to dispose of a controversy by an effective judgment, if the complaint sets up a cause of action, whether the relief asked be legal, equitable, or both. The forum of the trial, whether before the court or a jury, will be determined when it comes on to be heard (*De Bussierre v. Holladay*, 4 *Abb. New Cas.* 111).

But in the case of agencies, such as the one under consideration, where accounts are involved, actions may be brought on the equity side of the court for an accounting (*Story Equity Jur.* §§ 462, 463; *Tam v. Vilmar*, 54 *How. Pr.* 235, 238).

This disposes of the objection that the complaint does not set up facts sufficient to establish a cause of action. *Salter v. Ham* (31 *N. Y.* 321) is not opposed to this view.

The plaintiff, as the purchaser and owner of the interest and claim of the principal, and of all his rights of property under the agreement, is entitled to stand in his shoes and demand the account.

All rights and interests *ex contractu* are assignable (*Butler v. New York & Erie R. R. Co.*, 22 *Barb.* 110; *Hooker v. Eagle Bank of Rochester*, 30 *N. Y.* 87).

We think the disposition of the demurrer made by

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the judge at special term was correct, and the order appealed from is affirmed, with costs.

SPEIR, J., concurred.

CHARLOTTE ANN NICOLL, *et al.*, EXECUTORS,
&C., PLAINTIFFS AND RESPONDENTS, v. ED-
WARD BURKE, DEFENDANT AND APPELLANT.

LANDLORD AND TENANT.—AGENCY.—EVIDENCE.

The plaintiffs, as executors, through their agents, leased certain premises to the defendant.

The indenture of lease introduced in evidence, upon which the action was brought, was not under seal, and was signed by the lessee only, the defendant herein. The plaintiffs, said agents, were mentioned and described therein *as landlords*, with the word "Agents" after their names. It appeared that the defendant understood that he made the engagement to lease, &c., with persons who were acting for others.—*Held*, that an agent can bind his principal by a *parol* contract entered into in his own (the agent's) name, though the principal's name does not appear in the instrument; and that in this case the plaintiffs were properly in court to enforce the agreement made by them, through their agent, with the defendant.

Also held, that as the plaintiffs are shown to be the persons entitled to execute the lease and to the rent, it is to be presumed that the counterpart of the above indenture was properly executed on their behalf, it not having been introduced in evidence by the defendant, in whose possession it is presumed to be.

Before VAN VORST and SPEIR, JJ.

Decided March 3, 1879.

This is an appeal from a judgment in favor of plaintiffs, entered upon a verdict of a jury, and also from an order denying a motion for a new trial made

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upon the minutes of Hon. JOHN SEDGWICK, the judge before whom the action was tried.

The action was brought to recover three several balances of rent, in all amounting to \$150, alleged to be due for the three several quarters ending on August 1, and November 1, 1876, and on February 1, 1877; also, to recover \$600 alleged to be due for the quarter ending May 1, 1877, under and in pursuance of an indenture of lease alleged to have been made between the plaintiffs, by their agents, William and E. A. Cruikshank, and the defendant, dated March 2, 1876, for one year from May 1, 1876, at the yearly rent of \$2,400.

Also to recover damages for an alleged breach of covenant in omitting to pay \$19.55, the Croton water tax, and omitting to keep the premises in good order and repair, amounting to \$300.

Kissam & Embury, attorneys, and *Benjamin S. Kissam*, of counsel, for appellants.

Edmonds & Nicoll, attorneys, and *Walter D. Edmonds*, of counsel, for respondents.

BY THE COURT.—VAN VORST, J.—The defendant, on March 2, 1876, signed a writing, indorsed on the lease, under which he had held the premises several years, in these words: "The within lease is hereby renewed for the further term of one year, to commence on May 1, 1876, at the yearly rent of two thousand four hundred dollars, other covenants and conditions to remain as before."

This is a formal and effective agreement, binding upon the defendant to take the premises for one year, at the rent mentioned, and subject to the covenants and conditions he was before under. The defendant has not paid the full amount of the rent called for in the agreement. He claims, however, that there was a subsequent agreement by which the rent was reduced.

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The verbal arrangement, claimed to have been afterwards made with De Lancy Nicoll, the plaintiff's agent, to take a less sum, if it was proven, is wholly inoperative. Nicoll denies that he agreed to accept a less sum, unless the rent was promptly paid, and he testifies it was not.

But whether he so agreed or not, it would not bind the principals, for the reason that it was made without authority, and was founded on no adequate consideration. But receipts were signed accepting a less sum in full as the rent fell due from time to time. The receipts were not signed by the principals, but by the agents. Under such circumstances, as no authority to accept a less sum was shown, the acts of the agents would not discharge the moneys still unpaid. But in any view, the acceptance of a smaller sum, when a greater is due, does not discharge the real indebtedness (*Dederick v. Leman*, 5 *Johns.* 333 ; *Ryan v. Ward*, 48 *N. Y.* 204).

The rule is, however, otherwise, where the amount of the indebtedness is in dispute, and a compromise is agreed upon (*Bunge v. Koop*, 48 *N. Y.* 228). There could be no dispute here, as the true amount of the rent was fixed by the writing of March 2, 1876.

When the lease of 1873, upon which the indorsement in 1876 was made, was offered in evidence, it was objected to by defendant's counsel, on the ground that it was not made in the names of the plaintiffs.

It was, however, received, and the defendants excepted.

The learned counsel for the defendant takes the point that the plaintiffs cannot maintain an action for the rest. He urges that William and E. A. Cruikshank are the landlords, as appears by the original lease, and that the word "agents," which follows their names, is descriptive merely.

The lease in evidence is executed by the defendant

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only. By whom the counterpart was executed does not appear. It may be that it was so executed as to obviate any objection of the nature of the one now considered. From the fact that it was not produced by the defendant, in whose possession it is presumed to be, it may be inferred that it was executed in a form to bind the plaintiffs. But however that may be, we have now to do with the indorsement made in March 2, 1876, signed by the defendant, which gives occasion to this action, and which in effect draws to itself the covenants and conditions of the old lease. There is evidence in the case that Cruikshank and De Lancy Nicoll, in their action, merely represented others. That seems to have been understood, and the engagement arising from the indorsement of March 2, 1876, must be construed to have been made with those legally entitled to let the premises, and to be enforced by them.

The defendant's counsel has cited several cases to show that all contracts must be made in the name of the principal and not of the agent, and that when they are not so made, although the agent may be, the principal is not bound; among which are *Kiersted v. Orange & Alexandria R. R. Co.* (69 *N. Y.* 343); *Stone v. Wood* (7 *Cow.* 453); *Spencer v. Field* (10 *Wend.* 88); *Townsend v. Hubbard* (4 *Hill*, 351); *De Witt v. Walton* (5 *Seld.* 571). But, as already observed, it does not appear in what manner, on the part of the lessors, the lease was executed. And as the plaintiffs are now shown to be the persons entitled to make the lease, and to the rents, we may presume it was well executed on their behalf.

But while it may be true that when an agent enters into a contract *under seal* in his own name, he does not bind his principal by its terms, and the principal may be unable to enforce it in his own name, yet a principal may be charged where a written *parol* con-

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tract, entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument (*Briggs v. Partridge*, 64 *N. Y.* 357, 362).

The engagement for letting and hiring the premises in question for one year was not required to be in writing, and the defendant's obligation was not under seal.

He, in fact, made the engagement with persons who, as he understood at the time, were acting for others. And we conclude that the principals, the real parties in interest, are properly in court, to enforce the defendant's engagement, made with them through the agency of Cruikshank and Nicoll.

We discover no error in the refusal of the judge to charge as requested by the defendant's counsel, nor to the charge as made.

The plaintiffs' claim to allowance for any part of the repairs made by them, was rejected by the jury under the judge's charge; the defendant being held only for the rent in arrear, and the Croton Water tax.

The defendant was not justified in his attempt to surrender the premises by the terms of the original letting. Nor was such attempted surrender accepted by the plaintiffs. The effect of the verdict of the jury is only to impose upon the defendant the payment of rent according to his engagement, and nothing more, and in that we fail to see any injustice. The judgment and order denying a motion for a new trial, from which this appeal is taken, are affirmed, with costs.

SPEIR, J., concurred.

Appellant's Points.

DAVID SOLINGER, PLAINTIFF AND RESPONDENT,
v. EDWARD EARLE, *et al.*, DEFENDANTS AND
APPELLANTS.

DURESS, WHAT CONSTITUTES.—COMPOSITION DEED.—FRAUD ON CREDITORS.

There cannot be any legal inference from the fact of family connection alone, that the interest of a person in a brother-in-law is so great as to cloud the judgment or affect the will, in determining how far he will aid him.—*Held*, in this case, that the refusal of defendants to sign a composition deed releasing plaintiff's brother-in-law, except upon condition that plaintiff should give his note for a certain sum over and above that mentioned in the said deed, the note to be held till other creditors should sign the composition deed, did not amount to duress or compulsion, though defendants were aware of the affinity of plaintiff to said debtor.

By the said deed of composition, thirty cents on the dollar were to be paid the defendants, among other creditors, in plaintiff's notes, with the debtor's indorsement.—*Held*, that the above transaction, by which defendants, without the knowledge of the other creditors, received a further note of plaintiff, was illegal, and a fraud upon the said creditors; and that all the parties thereto were equally in the wrong.

Upon the above grounds, the court refused to interfere to aid plaintiff to recover the amount of said note paid by him.

Before VAN VORST and SPEIR, JJ.

Decided March 3, 1879.

Appeal by the defendants from a judgment entered upon a demurrer to the complaint, in favor of the plaintiff. The facts are stated in the opinion.

Ivins & Bergen, attorneys, and *Wm. M. Ivins*, of counsel, for appellants, cited :—As to the reason of the rule that coercion, compulsion or duress will avoid a contract or relieve a party from the plea *in pari delicto* : *Foshay v. Ferguson*, 5 *Hill*, 174; *United States v.*

Respondent's Points.

Huckabee, 16 *Wall.* 431; *Broome's Common Law*, 609.

As to the degree of compulsion which the law requires to be shown by the party seeking to avoid the natural legal consequences of his own acts, upon the plea of their involuntariness: *Radick v. Hutchins*, 5 *Otto* (95 *U. S.*) 210; *Brown v. Pierce*, 7 *Wall.* 205; *Miller v. Miller*, 68 *Penn. St.* 493; *Foss v. Hildreth*, 92 *Mass.* 76; *Chitty on Contr.* 217; *Story on Contr.* § 514; *United States v. Huckabee, supra*; *Feller v. Green*, 26 *Mich.* 70.

As to the kind of compulsion which the court will permit a party to plead for the purposes sought by the plaintiff: *Bouvier's Law Dict.*, "Duress," and cases cited; *Biffin v. Bignell*, 7 *H. & N.*; *Wilcox v. Howland*, 23 *Pick.* 167; *Evans v. Gale*, 18 *N. H.* 397; *Kenworthy's Case*, *Dec. Joint Com.* 334; *Hall v. Shultz*, 4 *Johns.* 240; *Skeate v. Beale*, 11 *Ad. & E.* 983; *Glynn v. Thomas*, 11 *Exch.* 878, 879; 39 *American Jur.* 26, *et seq.*; *Cro. Jac.* 187; *Wayne v. Sands*, 1 *Freeman*, 351; 1 *Roll. Abr.* 687; 2 *Danu. Abr.* 686; *Bagley v. Clair*, 2 *Brownl.* 276; *Robinson v. Gould*, 11 *Cush.* 57; *McClintock v. Cummins*, 3 *McLean*, 158, and other cases there cited; *Breck v. Cole*, 4 *Sandf.* 79.

Abraham Kling, attorney, and of counsel, for respondent, cited:—As to moral duress: *Smith v. Bromley*, 2 *Douglas*, 696, note, decided 1731; *Harmony v. Bingham*, 12 *N. Y.* 100; *Cockshott v. Bennett*, 2 *Term R.* 763, decided 1788; *Middleton v. Onlow*, 1 *Peere Williams*, 768; *Jackson v. Mitchell*, 13 *Ves.* 581; *Smith v. Cuff*, 6 *Maule & Sel.* 160; *Knight v. Hunt*, 5 *Bing.* 433; *Atkinson v. Derby*, 6 *Hurl. & N.* 778; *Breck v. Cole*, 4 *Sandf.* 79; *Exp. Sadler*, 15 *Ves.* 55; *Horton v. Riley*, 11 *Mees. & W.* 482; 1 *Story Eq.* §§ 378, 379; 14 *Alb. Law Jour.* 436; 15 *Id.* 35; *Gilmour v. Thompson*, 49 *How. Pr.* 198.

Opinion of the Court, by SPEIR, J.

BY THE COURT.—SPEIR, J.—The firm of Newman & Bernhard, being embarrassed in business, entered into a composition agreement with their creditors to pay thirty cents on a dollar in full satisfaction of their indebtedness, and gave, in payment thereof, the plaintiff's promissory notes, with the debtor's indorsements, payable in two, four and six months. The plaintiff and defendants entered into a written agreement between themselves, unknown to the other creditors, that the plaintiff should give his promissory note for \$978.79, in addition to the thirty per cent., payable to the order of the defendants, which was not to be used till all the creditors of Newman & Bernhard had signed the composition agreement. The note was paid in the hands of third parties after suit was brought, but before judgment.

That the note was without consideration, and the agreement to give it was a fraud upon the other creditors, is conceded by both sides. It is a general rule that courts will not aid either party in enforcing an illegal executory contract, nor, if executed, will they aid either party in setting it aside, or in recovering back what has been paid under it. This results from the established elementary principle that all contracts or agreements which have for their object anything repugnant to the general policy of the common law, or contrary to the provisions of any statute, are void and not to be enforced. The whole transaction, the agreement to give the note, and giving it to the defendants to hold until the creditors should sign the composition deed, and the payment of the money to the defendants, was illegal and void. If the act of the plaintiff was voluntary he has no case against the defendant to recover back the money paid, for he cannot avail himself of his own unlawful act. Where both parties are equally guilty, neither can excuse or justify his conduct by appealing to the law.

Opinion of the Court, by SPEER, J.

The allegation in the complaint is in substance that the agreement and the making and delivery of the note were unknown to, and were by the defendants fraudulently concealed from, the other creditors, and was first proposed by the defendants to plaintiff; and the object and purpose thereof on the part of the defendants was that they should receive the note in addition to the sum mentioned and paid by the terms of the composition agreement, in fraud of other creditors and their rights. Whether the scheme which was devised and carried out between the parties was first suggested by the defendants as charged, is of no importance. The plaintiff was equally bound with the defendants to disclose the whole transaction to the other creditors. It is in all cases the concealment of the fact which was material for them to know, the knowledge of which might have prevented their own assenting to the composition agreement (*Britton v. Hughs*, 5 *Bing.* 466, *BEST*, Ch. J.).

There is nothing in the allegation that the defendants subjected the plaintiff to any coercion which would justify an action against them either for the return of the note or the money paid on it, or for damages of any kind. There is no averment that the defendants or either of them ever made or attempted to make any threats against the plaintiff or against his brother-in-law, Newman. What they did do, as alleged, they insisted upon his making and delivering the agreement between them and the plaintiff, and the giving the promissory note, and absolutely refused to execute the composition agreement unless the plaintiff complied with their demand. This the defendants had the right to do. They could refuse to execute a discharge of the debtors absolutely, or could exact conditions, provided the other creditors had knowledge thereof, and it is plain that the plaintiff was equally guilty in withholding that knowledge from the other creditors.

Opinion of the Court, by SPEIR, J.

To relieve the plaintiff from the consequences of his participation in the fraudulent transaction, and to enable him to recover the money he had paid to the defendant, he sets up that his action therein was involuntary and by compulsion, and he cannot, therefore, in law, be regarded as having acted at all. He says the defendants knowingly and fraudulently took advantage of the feelings, sympathies and sensibilities he had for his brother-in law, Newman, to compel him to execute the agreement to give his note. Duress by threats cannot be claimed, since, as before shown, no threats of any kind are alleged. The defense then must rest upon the naked statement that Newman was the plaintiff's brother-in-law, and the defendants knew it. No facts are stated by which the plaintiff's will was restrained or influenced by the defendants, other than the affinity which existed between the plaintiff and Newman. The plaintiff was not related by blood to the debtor, nor was he a member of his family. By the Civil Code of Louisiana, which, in this respect, is a transcript of the French Code, the causes of nullity for duress are limited, not only where they are exercised on the contracting party, but also when the wife, the husband, the descendants or ascendants of the party are the object of them (2 *Civil Code of Louisiana*, § 1847). Affinity means the tie which arises from the marriage between the husband and the blood relations of his wife, and between the wife and the blood relations of the husband (*Vaughn*, 302, 329; *Biffin v. Bignell*, 7 *Hurl. & N.* 877). I am unable to find any case either in the civil or common law where the party complaining of moral duress to avoid a contract was a relation by affinity. Even if such a case could be found, in order to sustain the complaint we must hold that the statement *per se* of the plaintiff's being the brother-in-law of the debtor is a sufficient duress to

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avoid the contract, there being neither threats nor facts showing compulsion in the complaint.

The judgment must be reversed, and the complaint dismissed, with costs.

VAN VORST, J., concurred.

JAMES M. ORMES, PLAINTIFF, v. SAMUEL T.
DAUCHY, *et al.*, DEFENDANTS.

BROKERS.—PUBLIC POLICY.—TRIAL.

A broker, who agrees merely to bring parties together for the purpose of negotiation, upon consideration of a promise of one of said parties to pay him a certain percentage upon the amount of a contract thereby expected to be made, and who takes no part in the subsequent proceedings of the parties, can recover his said commissions according to agreement, though the contract entered into, and upon which they depend, is illegal and void as against public policy, *e. g.*, a contract for advertising a lottery scheme.

The law does not punish a wrongful intent where nothing is done to carry that intent into effect, much less *bare knowledge* of such an intent, without any participation in it.

If the defendants desired that the question whether they were to pay the commission as the money was paid to them, or not until they had been paid the full contract price of the work, be submitted to the jury, they should have requested it. The exception to the court's directing a verdict was not equivalent to a request.

Before VAN VORST and SPEIR, JJ.

Decided March 3, 1879.

The defendants were advertising agents. In August, 1874, they agreed with the plaintiff and his assignor, Niles, that if they would bring to the defendants the officers of a certain Virginia corporation who desired

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to advertise in various parts of the country, and it should result in a contract between the defendants and the corporation, the defendants would pay the plaintiff and Niles ten per centum on the contract price of the advertising to be done.

The plaintiff and Niles introduced the officers of the corporation to the defendants, who entered into a contract with the officers. The defendants admit that they did the work under the contract for the corporation to the amount of \$13,000, but assert that the company paid them therefor only \$5,500. On the trial, the court took the defendants' construction of the agreement with the plaintiff, viz. : that the defendants were to pay the commission only on the amount they should actually collect. This was most favorable for the defendants, and the plaintiff was content. The court accordingly directed a verdict for the plaintiff for \$550, being ten per cent. of \$5,500, the sum the defendants admit they actually collected.

Exceptions to be heard in the first instance at general term, and judgment meanwhile suspended.

Henry F. Pultzs, of counsel, for defendants, appellants.

John E. Risley, of counsel, for plaintiff, respondent.

BY THE COURT.—SPEIR, J.—The main defense in the case was that the contract between the defendants and the Montpelier Association, a corporation created by the laws of Virginia, was in violation of the statutes of this State, which prohibit the publication of an account of any lottery, gain or device, or the prizes therein, &c. That such a contract was entered into in writing between the corporation in Virginia and the defendants is not disputed. What the contract was is not shown. Neither the plaintiff nor his assignor,

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Niles, ever saw it. The defendants failed to produce it on the trial, although they had notice to do so, and it appears it was in the possession of their agent in Virginia, to whom they had sent it, and they were not permitted to give evidence of its contents on the trial.

It is not claimed or pretended that the plaintiff or his assignor were parties to the contract in question, though it is asserted that the parties entered into it at their instance. In other words, it is shown that the plaintiffs acted as brokers in bringing the parties together, who thereupon executed a contract, whatever it was, and the plaintiffs claim a commission for their services in that capacity. I am unable to see why the plaintiff should not recover the commission sued for, even though the contract made between the defendants and the Virginia company was illegal or against public policy. There is no proof that the plaintiff or Niles took any part in making the contract or in its performance after it was made. Their engagement was ended when they introduced the parties to each other, and the law allows them compensation for that particular service. The contract of the plaintiff was, in itself, therefore, lawful and free from vice, and I do not see how it can be avoided on the ground that it possibly may have facilitated an illegal transaction. It is impossible to foresee where the doctrine would carry us should it be held that the broker's contract is void because it may have some remote connection with other unlawful contracts. I am not aware of any principle which could justify this. The law does not punish a wrongful intent when nothing is done to carry that intent into effect, much less *bare knowledge* of such an intent without any participation in it (*De Groot v. Van Duzer*, 17 *Wend.* 170; *Hodgson v. Temple*, 5 *Taunt.* 181; *Tracy v. Tallmage*, 14 *N. Y.* 169).

The exceptions to the refusal of the court to dismiss the complaint when the plaintiff rested, and at the

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close of the case, are disposed of above. The exception taken that the court should have submitted to the jury the question whether the defendants were to pay the commission as the money was paid to them, or not until they had paid the full contract price of the work, was disposed of by arrangement on the trial. Besides, the exception taken to the court's directing a verdict was not equivalent to a request that the question be submitted to the jury, which was not done (*O'Neil v. James*, 43 *N. Y.* 84; *Dows v. Rush*, 28 *Barb.* 157).

The plaintiff is entitled to judgment on the verdict, with costs.

VAN VORST, J., concurred.

HENRY HEINER, PLAINTIFF AND RESPONDENT,
v. JOHN HEUVELMAN, *et al.*, DEFENDANTS
AND APPELLANTS.

NEGLIGENCE.—LIABILITY OF MASTER FOR INJURY OF SERVANT.

Where the master abdicates the control and management of certain work in favor of an employee, and gives him full discretion in regard thereto, he is liable for the neglect of said employee, in the performance thereof, to the same extent that he would be liable for his own neglect. This though the party injured thereby and seeking redress was also employed by him as a workman, engaged in the same matter and under the control of said employee.

The above rule is not affected by the fact that the master has exercised due care in the selection of the person assigned to said duty.

Before VAN VORST and SPEIR, JJ.

Decided March 8, 1879.

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The action was brought by the plaintiff for damages sustained by him while in the defendants' employment, and caused by their negligence.

The plaintiff, an iron-worker by trade, was in the employ of defendants, and was engaged in the county court-house, in the city of New York, removing the iron columns from the interior sides of the rotunda. The defendants were the contractors with the city, for the alterations of the court-house, then in progress.

At the time of the accident, the plaintiff and two others, servants of the defendants, were at work on the balcony running round the rotunda, on the floor, removing a scaffolding. One Jacob Webber had been assigned by defendants to employ the servants to do this duty, and at the same time engaged them in removing a derrick over the heads of the plaintiff and his fellows on the balcony. While being moved, the derrick fell forward into the rotunda, and the plaintiff was entangled in its rigging, and had his arms broken and his head injured.

Chambers, Boughton & Prentiss, defendants' attorneys; *Wm. P. Chambers*, of counsel.

C. S. & D. B. Ogden, plaintiffs attorneys; *Albert Stickney*, of counsel.

BY THE COURT.—SPEIR, J.—The evidence shows clearly that there was no negligence on the part of the men moving the derrick. The negligence complained of was that of Webber, in sending an insufficient number of men to do the work of removing the derrick, which was done in his absence, and at the same time sending the plaintiff to a position in which injury was inevitable should any accident occur. The cause of the derrick's fall was that its weight was greater than

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the men assigned to the task of moving it could sustain.

The defendants had employed Webber to select and hire the workmen, and they gave to him full discretion as to the number to be employed in the work on hand at any particular time, and full control of the manner and conduct of the operation.

There can be no question but the motion of the defendants for a nonsuit at the close of the plaintiff's case was properly refused. It was not pretended that the men in charge of removing the derrick were not sufficiently careful in doing the work to which they had been assigned by Webber. He represented the defendants, and if there was any neglect of duty on his part the defendants are responsible, although the plaintiff and himself were in their employ; for the evidence in the case clearly shows that Webber did not stand in the same relation to the defendants and to the plaintiff respectively which the other workmen did.

It is claimed that the judgment should be reversed for the reason that the court erred in charging the jury, in substance, that while the defendants were not liable if the injuries were occasioned solely through the negligence of defendants' servants other than the foreman, Webber, they were responsible for Webber's negligence, if any, in the same manner and to the same extent as if his negligence had been their own. The defendants delegated to their foreman the performance of the duties they owed to their other employees, and he failed to furnish a sufficient number of workmen to perform the work in hand. This constituted negligence, for which the defendants are responsible (*Flike v. Boston & Albany R. R. Co.*, 53 *N. Y.* 554). It does not matter how careful the defendants were in the selection of Webber for the post assigned him, they are responsible for his failure to provide a sufficient

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force safely to perform the work in hand. Nor does the rule apply that the master is not liable to a servant for injuries resulting solely through the negligence of a fellow-servant.

The court refused to charge the jury according to defendants' fifth request: "That if the jury believe that Webber was defendants' foreman or superintendent, charged with the special duty of superintending the work in question, but performed it under general instructions from defendants, the plaintiff cannot recover." We think the refusal was proper. Such a charge would, in effect, confound Webber's agency with that of a mere foreman, charged, it is true, with special duties, but performing them under general or special instructions from the principal, who retains and has the general supervision of the business, and to whom and whose direction all are subject. The distinction is entirely lost sight of, as plainly appears in the case of *Flike v. Boston & Albany R. R. Co.* (53 *N. Y.* 549). In the case at bar the master abdicates the management and control of the work in favor of the employee; in the case last cited the principal retains and holds the general supervision of the business.

The second, third and fourth requests to charge were properly refused. These were based upon the mistaken notion that, as a matter of law, and upon the facts in evidence, that the defendants were not liable for Webber's carelessness.

The judgment and order appealed from must be affirmed, with costs.

VAN VORST, J., concurred.

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LAURENCE ENNIS, PLAINTIFF AND APPELLANT, v.
JOHN F. BRODERICK AND THOMAS NOLAN,
DEFENDANTS AND RESPONDENTS.

UNDERTAKING UNDER SECTIONS 354, 356, OF THE CODE.—LIABILITY
OF SURETIES THEREON.—EXECUTION, INFORMALITY IN RETURN OF.

When, on an appeal from a judgment of the district court, the appellant gives the undertakings required by sections 354 and 356 of the Code, in one instrument, which is duly approved by a justice of said court, and files it *with the clerk of the court of common pleas*, it is a sufficient compliance with the statute to operate as a stay upon the judgment appealed from (*Jackson v. Smith*, 16 *Abb. Pr.* 201).

By the undertaking upon which this action is brought (which was the same as the one above described) the defendants undertook that if the judgment should be affirmed on appeal, and execution issued thereon be returned unsatisfied, they would pay the amount unsatisfied. *Held*, that to make a *prima facie* case under the pleading, plaintiff was only bound to show that the judgment had been affirmed, and that execution issued thereon had been returned unsatisfied (*Sperling v. Levy*, 1 *Daly*, 95).

By the filing of a transcript of the judgment referred to in said undertaking in the office of the clerk of the city and county of New York, it thereupon became a judgment of the court of common pleas, for all purposes of enforcing satisfaction.

If the formal requirement in the execution issued thereafter upon the same, directing the sheriff to return said execution to the *clerk of the city and county of New York*, was erroneous, which, however, is not clear under the new Code, it was a mere informality which may be disregarded, and which cannot be taken advantage of by defendants herein.

Chapter 484 of the *Laws of 1862* does not apply to the case at bar. It provides a cumulative remedy against marshals and their sureties, by suit on their *official bonds*.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided March 3, 1879.

The plaintiff recovered judgment on July 13, 1877, against Lawrence A. Curry, one of the marshals of the

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city of New York, in the district court of the city of New York, for the First Judicial District.

Curry appealed from that judgment to the general term of the court of common pleas, and gave the usual undertaking required by section 356 of the Code, to stay proceedings, in which the defendants herein were the sureties.

It was duly approved by the justice of the district court, and filed in the office of the clerk of the court of common pleas on the day of its approval.

A transcript of that judgment was filed in the office of the clerk of the city and county of New York, on the day of its recovery.

The judgment appealed from was affirmed by the court of common pleas on November 23, 1877, and, upon entry of judgment of affirmance and filing of transcript thereof in the county clerk's office, execution was issued on both out of the court of common pleas to the sheriff of the city and county of New York, and, by said sheriff, returned on December 14, 1877, wholly unsatisfied, and the one issued upon the district court judgment was returned to the clerk of the city and county of New York, pursuant to section 1,367 of the Code of Civil Procedure.

This action is brought to recover of the defendants the amount of said judgment upon the undertaking given on appeal.

At the trial, upon the close of plaintiff's evidence, the defendants moved for a dismissal of the complaint upon the following grounds.

I. That no notice of entry of judgment of affirmance had been given, either to the attorney for Curry in the suit of Ennis v. Curry, or to the sureties (who are defendants here), previous to the commencement of this action.

II. That an undertaking to stay proceedings must be delivered to and filed with the justice in the district

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court. That the undertaking in this action was never delivered to him, but simply approved by him, then immediately taken from him by the person offering it for approval, and filed with the clerk of the court of common pleas, for the mere purpose of perfecting an appeal; and therefore the sureties, at most, are obligated only to the extent of the costs, and the costs having been paid under the order of the court, the plaintiff could recover nothing more in this action.

III. That no transcript of the judgment against the marshal having been filed in the office of the clerk of the court of common pleas, pursuant to section 8 of chapter 484 of the *Laws of 1862*, the plaintiff could not maintain this action against the defendants.

IV. That no execution having been issued and returned to the court of common pleas upon such judgment, the plaintiff could not recover.

The court dismissed the complaint, to which order dismissing the complaint the plaintiff excepted.

The court thereupon adjourned for the term. Afterwards, plaintiff's attorney obtained from another judge sitting at Chambers, an order to show cause why a new trial should not be granted upon the minutes of the judge who had presided at the trial. The motion was heard by the judge last referred to, and denied.

Plaintiff appealed from the judgment and the order denying motion for new trial.

L. B. Bunnell, for appellant.

Thomas & Wilder, for respondents.

BY THE COURT.—FREEDMAN, J.—The evidence shows that on July 19, 1877, the undertaking sued upon was duly approved by the justice of the district court, and that thereupon it was filed in the office of the clerk of the court of common pleas. This was a

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sufficient compliance with the statute to operate as a stay upon the judgment appealed from (*Jackson v. Smith*, 16 *Abb. Pr.* 201).

By that undertaking the defendants undertook that if the judgment should be affirmed on appeal, and execution issued thereon be returned unsatisfied, they would pay the amount unsatisfied. The judgment was affirmed and the execution issued thereon returned unsatisfied, and that was all the plaintiff was under the pleadings bound to show, in order to make out a *prima facie* case (*Sperling v. Levy*, 1 *Daly*, 95).

By the filing of the transcript in the office of the clerk of the city and county of New York, the judgment against Curry became a judgment of the court of common pleas for all purposes of enforcing satisfaction (*Code*, § 68). The filing of the transcript in the office of the clerk of the city and county of New York was necessary, in order to make the judgment against Curry a lien upon his real estate, if he had any, and to enable the plaintiff to issue an execution against both the personal and real property of the judgment debtor.

If the formal requirement, directing the sheriff to return the execution to the office of the clerk of the city and county of New York, was erroneous, which, however, is not clear since the new Code, it was, as held by ROBINSON, J., in *Ennis v. Curry*, a mere informality, which may be disregarded.

Chapter 484 of the *Laws of 1862* does not include the case at bar. It provides a cumulative remedy against marshals and their sureties, by suit on their official bonds. Upon proof that a judgment has been recovered against a marshal for official misconduct, that a transcript of such judgment has been filed in the office of the clerk of the city and county of New York, and that an execution issued thereon has been unsatisfied, &c., &c., a judge of the court of common pleas may grant leave to sue upon the official bond.

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Such suit is to be brought in the marine court, or any of the district courts, and if judgment be recovered, a transcript of such judgment must be filed with the clerk of the court of common pleas, to the end that it may be enforced in that court, as provided for by the said act, and that the clerk of said court, who by law is the custodian of the bond, may cancel the bond to the extent of the judgment. When the bond of any marshal gets entirely canceled by the entry of such judgments against it, the clerk must notify the mayor to that effect, and then the mayor must suspend the marshal. These provisions, it will be seen, do not at all apply to an action against a marshal's sureties upon an appeal bond.

The objection that no notice was shown to have been given to the attorney of Curry, or the sureties, the defendants herein, of the entry of the judgment of affirmance, was abandoned on the argument, and consequently does not require to be considered.

The judgment should be reversed, with costs to appellant, to abide the event. But the order denying plaintiff's motion upon the judge's minutes for a new trial must be affirmed, with costs, because the motion was not made during the term at which the trial took place.

CURTIS, Ch. J., concurred.

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THE ST. NICHOLAS NATIONAL BANK OF NEW YORK, PLAINTIFF AND APPELLANT, v. WILLIAM SAVERY, WILLIAM E. SAVERY, GEORGE W. MASON AND GEORGE W. VAN SCHAACK, IMPEADED WITH ALEXANDER LAW, DEFENDANTS AND RESPONDENTS.

LAW MERCHANT.—NEGOTIABLE PAPER.—PARTNERSHIP.

In this case the following propositions were laid down, and their legal conclusions held. The 1st and 2d were held to be in full accord with the general rule, applicable to individual indorsers, and the 3d and last was founded on the law merchant.

1. When a party takes negotiable paper, made, accepted or indorsed by one of several partners, in or with the partnership name, and the fact that such name was not signed or indorsed in the regular course of the business of the firm is apparent on the face of the instrument, or necessarily implied in the nature of the transaction, such party cannot, though he may have parted with value on the faith of the paper, charge the other members of the firm, except upon proof that they assented to the transaction. In every such case he is chargeable, as matter of law, with notice of want of authority in the individual partner to bind the firm without their express assent.
2. When the fact, though existing, that such name was not signed or indorsed in the regular course of the business of the firm is not apparent from the face of the instrument, and the nature of the transaction appears to be susceptible of different conclusions, the question of notice is one of fact, to be determined by the jury upon all the circumstances. In every such case, the burden is again upon the plaintiff, though he may have parted with value, to satisfy the jury, either that the circumstances of the case did not constitute notice to him, or that, if they did, the other members of the firm assented to the transaction.
3. When the fact, though existing, that such name was not signed or indorsed in the regular course of the business of the firm, is not apparent from the face of the instrument, and the nature of the transaction appears to have been of such a character as to give the plaintiff a right to suppose that it was a partnership transaction, the members contesting their liability must not only

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show that in fact it did not constitute such a transaction, but also that the plaintiff had in some way actual notice thereof. In every such case, the burden is shifted upon the defendant to establish notice.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided March 8, 1879.

Appeal from judgment entered in favor of defendants upon the verdict of a jury, and from the order denying plaintiff's motion for a new trial, made on the judge's minutes.

The action was brought upon a note for \$4,000, made by the firm of Charles F. Parker & Co., payable to their own order, and indorsed by them, also indorsed by Alexander Law, and beneath his indorsement with the name of "John Savery's Sons" (defendants' firm), which note had been discounted by the plaintiff.

The defendant Law did not answer.

All the other defendants answered, and averred, among other things :

"That the said note was indorsed by the firm of Charles F. Parker & Co., payees, therein named, to the defendant, Alexander Law, individually, and that said Alexander Law, without the knowledge or consent of these defendants, or any or either of them, fraudulently indorsed the same in the name of defendants, solely as a further security for his individual indorsement thereon, and delivered the same so indorsed to the plaintiff for his own individual use and benefit.

"They allege that the same was not in any manner indorsed or delivered for the benefit of said firm, or in the course of business of said firm, and that neither said defendants' firm, nor any or either of these defendants, ever derived any benefit whatever from said

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notes, or had any interest whatever in the same, or its proceeds, and they allege, on information and belief, that the plaintiff, before and at the time of said transfer to itself, had full knowledge of all the matters above alleged."

Upon the trial evidence was given by both parties, and the court submitted the question to the jury, whether or not the discount was, in fact, made by the plaintiff for Law individually, or for the firm of John Savery's Sons, with directions that in the former case plaintiff could not recover against the answering defendants, but that in the latter their verdict should be for the plaintiff.

The jury found for the defendants.

Martin & Smith, attorneys, and *Aaron Pennington Whitehead*, of counsel, for appellants.

John A. Mapes, attorney and counsel, for respondents.

BY THE COURT.—FREEDMAN, J.—It is conceded that at the trial the answering defendants fully established that Alexander Law, who was a member of both firms whose names appeared upon the note, indorsed the said note with defendants' firm name wholly without authority, and not in the course of the business of the firm, but for his own individual benefit, and therefore in fraud of defendants' rights.

The point is raised, however, that the defendants failed to show that the bank had notice of these facts at the time it discounted the note, and that without affirmative proof to this effect on their part, the verdict cannot be sustained.

All the exceptions taken by the plaintiff during the progress of the trial, except one to be hereafter noticed, and especially those relating to the charge of the court

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and the refusals to charge, relate with more or less force to this point.

The question, therefore, to be determined is, upon which party the burden of proof was with respect to this branch of the case?

In an action against an individual indorser the law is well settled that, when he has shown that his indorsement was procured by fraud, the burden is then cast upon the plaintiff to establish that he is a *bona fide* holder for value, which means, that he had no notice of the fraud, and that he parted with value upon the faith of the note so indorsed. Proof merely that he parted with value is not sufficient. He must go further and show that he had no notice, and of this duty he cannot be relieved by suggesting that he should not be called upon to prove a negative.

It is claimed, however, that a different rule should have been adopted in this case, because the indorsement purported to be that of a firm, and as such must be presumed to have been made in the course of the partnership business.

The rule that the act of one, when it has the appearance of being on behalf of the firm, is considered the act of the rest, rests upon the law merchant. It is, as was said by NELSON, J., in *Gansevoort v. Williams* (14 *Wend.* 133), no doubt against general principles. Nevertheless, it is a rule firmly established. All the members of a firm are liable for money lent to the firm upon application of one of the partners, and it is not necessary to show the actual application of the money to the use of the firm; and, consequently, it was held that a note given by one of several partners in the name of the firm, for money ostensibly borrowed by such partner for such firm, is of itself presumptive evidence of the existence of a partnership debt; and if the other partners seek to avoid its payment, the burden of proof lies upon them to show that the note was

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given in a matter not relating to the partnership business, and that with the knowledge of the payee (*Whitaker v. Brown*, 16 *Wend.* 505). This principle has been uniformly adhered to whenever the act of the individual partner, in making or indorsing a note in or with the firm name, gave the holder of the note a right to suppose that he was acting in the course of the business of the firm.

But where a note made or indorsed by one partner in or with the firm name is shown to have been received by the plaintiff, under circumstances which indicate in themselves that he is not acting in the course of the business of the firm, the rule is otherwise.

Thus, where a note is given in the name of a firm by one of the partners, for his private debt, and these facts are known to the person taking the note, the other partners are not bound except upon proof that they were previously consulted, and consented to the transaction; and such consent, in this State at least, though the rule is otherwise in England, must be shown by the creditor who seeks to enforce the note against the firm (*Dob v. Halsey*, 16 *Johns.* 34, and cases there cited).

Upon the authority of this case it was held in *Foot v. Sabin* (19 *Johns.* 155) that the same principle applies with still greater force when one of several partners becomes surety on a note for another person, and, in doing so, attempts to bind his copartners; because in such a case the creditor must be aware that the individual partner is pledging the partnership responsibility in a matter in nowise connected with the partnership business. To the same effect are *Laverty v. Burr* (1 *Wend.* 529); *Bank of Rochester v. Bowen* (7 *Id.* 159); *Boyd v. Plum* (*Id.* 309).

In *Stall v. Catskill Bank* (18 *Wend.* 467) the circumstances were not clear in themselves, and there was a conflict of testimony as to whether the cashier of the

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bank in fact knew that the name of the firm had been signed to the note as a mere surety, and the case was submitted to the jury with the instruction, "that if the plaintiffs had any knowledge that the note in question was indorsed by Teats, without the knowledge of Stall, for the benefit of another person, they could not recover; but that the plaintiffs, being the holders of the note as negotiable paper, were entitled to recover against the defendant Stall, if they received the note in good faith, without knowledge that Stall had not assented to the indorsement, although it was indorsed by one of the partners in the name of the firm, without his knowledge or assent, and for the accommodation and benefit of the drawer." This charge was, under the circumstances of the case, held to be unobjectionable, and the judgment was affirmed. In the course of his reasoning in the case last referred to, the chancellor said:

"If the drawer of a note carries it to a bank to get it discounted on his own account, or transfers it to a third person, with the name of a firm indorsed thereon, the transaction on its face shows that it is a mere accommodation indorsement, or the note would not be in the hands of the drawer; and the bank, or person who receives it from the drawer, being thus chargeable with notice that the firm are mere sureties of the drawer, and that it has not passed through their hands in the ordinary course of partnership business, the members of the firm, who have been made sureties without their consent, are not liable to the holder of such note."

This statement of the rule by the chancellor was approved by the court of appeals in *Fielden v. Lahens* (2 *Abb. Ct. App. Dec.* 111). In that case the indorsements of the name of J. Lahens & Co. upon the notes were made by one of the members of said firm for the accommodation of the maker and without consideration

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to said firm, and the notes so indorsed were delivered to the maker, who delivered them to the plaintiffs. In affirming the judgment in favor of the defendants, it was held :

“The note being held by the maker, and put into circulation by him, in his own business, and for his own advantage, is evidence to the party taking it that whatever indorsements may be upon it were made for the maker's benefit, and not in the ordinary course of business ; for, in the ordinary course of business it would have passed from the maker to the payee and indorser. The party receiving it, therefore, from the maker, in payment of the maker's debts, assumes the risk of being able to show that the indorsement was in the usual course of business, and that the partners all consented to the act of the one who made the indorsement. As between the firm and the holder of the paper, this is but a reasonable rule. The partners are liable to a *bona fide* holder *without notice* in such case, only because he has the right to presume that the indorsement was made in the usual course of the partnership business, and therefore within the scope of the authority of the individual member of the firm who made it. But when the circumstances are such as to inform the holder of the fact that the indorsement was not made in the course of the partnership business, such presumption is excluded ; and it would be inequitable as well as illegal, as between the firm and the holder, for the court to presume the assent of the firm in favor of the holder thus notified.”

From the authorities referred to the following propositions may be deduced :

I. When a party takes negotiable paper, made, accepted, or indorsed by one of several partners, in or with the partnership name, and the fact that such name was not signed or indorsed in the regular course of the business of the firm is apparent on the face of

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the instrument, or necessarily implied in the nature of the transaction, such party cannot, though he may have parted with value on the faith of the paper, charge the other members of the firm, except upon proof that they assented to the transaction. In every such case he is chargeable, as matter of law, with notice of the want of authority in the individual partner to bind the firm without their express assent.

II. When the fact, though existing, that such name was not signed or indorsed in the regular course of the business of the firm, is not apparent from the face of the instrument, and the nature of the transaction appears to be susceptible of different conclusions, the question of notice is one of fact, to be determined by the jury upon all the circumstances. In every such case the burden is again upon the plaintiff, though he may have parted with value, to satisfy the jury, either that the circumstances of the case did not constitute notice to him, or that, if they did, the other members of the firm assented to the transaction.

III. When the fact, though existing, that such name was not signed or indorsed in the regular course of the business of the firm, is not apparent from the face of the instrument, and the nature of the transaction appears to have been of such a character as to give the plaintiff a right to suppose that it was a partnership transaction, the members contesting their liability must not only show that in fact it did not constitute such a transaction, but also that the plaintiff had in some way actual notice thereof. In every such case the burden is shifted upon the defendants to establish notice.

The first two propositions are in full accord with the general rule applicable to individual indorsers, that, upon proof of the procurement of the indorsement by fraud, the burden is cast upon the plaintiff to establish that he is a *bona fide* holder for value. The third con-

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stitutes an exception, founded upon the law merchant.

It now remains to be seen to which of these three classes the case at bar belongs.

The note in question was made by a firm of which Law was a member, indorsed by that firm, then indorsed by Law with his own name, then indorsed with the name of defendants' firm in the handwriting of Law, and presented by Law in person to the president of the bank for discount. There is no pretense that he represented it to belong to defendants' firm, or that he expressed a desire that it should be discounted for the benefit of said firm. On the contrary, it is one of the conceded facts of the case that the proceeds of the discount were paid to him by a check to his *individual order*. Moreover, the president of the bank, in a certain conversation had with Mason, one of the defendants, on the day of the maturity of the note, was shown to have spoken of it as a discount for Law. True, he denied having made any such remark, but that was a question for the jury. Neither side called Law as a witness.

Upon these facts it is clear that the case does not belong to the class named in the third proposition above stated, and that, if it does not fall within that specified in the first, it certainly falls within the class specified in the second proposition. The most, therefore, that plaintiff could ask, was that the case should be submitted to the jury, and that, in the absence of any proof showing defendants' assent, the jury should be instructed that the plaintiff was entitled to recover upon proof that it was a *bona fide* holder for value. The case was submitted to the jury, and they were charged, in substance, that the plaintiff could not recover unless it became the holder of the note in good faith for value, and without knowledge of the character of the indorsement; that it would in law be chargeable

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with such knowledge, if its president, who acted on behalf of the bank in discounting the note, dealt with Law individually; that if he dealt with him as a partner, plaintiff would not be thus chargeable; that there was nothing in the law which would draw the suspicion of a person to the note as being out of the usual course of business, because it had been made by a firm, indorsed by an individual member of that firm, and then indorsed by another firm of which he was a member; and that, therefore, if the president dealt with Law as an individual, the plaintiff could not recover; but if he dealt with him as a partner, and as the agent of defendants' firm, the plaintiff was entitled to recover. There is nothing in this charge, nor in the refusals to charge otherwise, to which an exception will lie. Nor can it be said that the verdict is against the evidence.

But a single exception has been argued relative to the admission of evidence, and that relates to the reception of certain admissions made by the president of the bank on the day the note matured. He was the executive officer of the bank. As such he had discounted the note. On the day of its maturity he called at defendants' store and asked for Law. Upon being told that the latter was not in, he had a conversation with Mason, one of the defendants, in the course of which, according to Mason's version of it, he said that he had called to see Law in order to find out whether the latter would pay the note which the bank had discounted for him. His call, being for the very purpose of collecting the note, was in the direct line of his duties as the executive officer of the bank, and the admission he then and there made, by way of explanation, was made concerning a transaction in which he had been throughout, and then still was, the authorized agent of the corporation. Mason's testimony upon this point was, therefore, neither against section 80 of 2 R. S. 407, nor incompetent for any other reason.

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Nor was it immaterial. The president had been examined as a witness for the plaintiff, and upon his cross-examination had been interrogated about the matters involved in this conversation; and had given a different version of the same. Mason's testimony was therefore admissible, because it contradicted that of the president upon a material point.

The judgment and order should be affirmed, with costs.

CURTIS, Ch. J., concurred.

LUTHER H. WYGANT, PLAINTIFF AND RESPONDENT, v. THE NATIONAL BURGLAR AND THEFT INSURANCE COMPANY OF THE CITY OF NEW YORK, DEFENDANT AND APPELLANT.

I. Evidence.

1. INFERENCES FROM PROBABILITIES.

The jury are entitled to draw inferences from the probability of a defense as testified to by the defendant's witnesses.

Before CURTIS, Ch. J., and SEDGWICK, J.

Decided March 3, 1879.

Appeal from a judgment for plaintiff entered on a verdict.

The action was brought to recover the value of services alleged to have been rendered to the defendant at its request by the plaintiff, as night watchman and patrolman. The answer was in substance a general denial.

S. R. Ten Eyck, for appellant.

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Jno. A. Mapes, for respondent.

PER CURIAM.—The verdict in this case is for less than \$500, and the judgment at general term cannot be reviewed in the court of appeals. This has called for great care in examining the exceptions and the sufficiency of the evidence. There is no benefit in detailing the exceptions, for they involve only general principles that have been often stated. An examination has shown that they were not valid.

There were many facts that were circumstantial, to support the verdict. As part of the facts, the jury were entitled to draw inferences from the probability of the defense, as it was testified to by defendant's witnesses. It is not necessary to give all the facts that tended to support the plaintiff's claim ; but the verdict must have been upheld if the only fact had been that the company gave a promissory note for part of plaintiff's wages, and handed it, for delivery to plaintiff, to Young, who had employed him on behalf of the company, and who gave him the note.

Judgment affirmed, with costs.

HENRY HENNEQUIN AND OTHERS, PLAINTIFFS AND
RESPONDENTS, v. HENRY CLEWS AND THEO-
DORE S. FOWLER, IMPEADED WITH FRED.
BUTTERFORD AND OTHERS, DEFENDANTS AND
APPELLANTS.

I. ARREST.

1. EQUITABLE ACTION against all defendants COMBINED.—Allegations constituting an ACTION AT LAW as to some.—ORDER OF ARREST, GRANTABLE WHEN.

Appellants' Points.

(a) Defendants, as to whom the allegations make a cause of action at law, for which under the Code an arrest may be had, CAN, *after the same has been tried as an equitable action, and disposed of as such, and the issues as to allegations constituting the legal cause of action have been sent to a jury for disposition*, BE ARRESTED.

II. *Bankrupt discharge.*

1. DEMAND NOT AFFECTED BY.

(a) Action for an unlawful *conversion by the trustees of property held in trust.*

Before CURTIS, Ch. J., and SEDGWICK, J.

Decided March 3, 1879.

Appeal from order denying a motion to set aside an order of arrest.

This action was tried as an equity cause, and disposed of as such. Certain allegations of the complaint as to which issues were raised by defendants Clews and Fowler, were held to constitute as to them an action at law, and were directed to be disposed of by a trial by jury. From the judgment entered on the decision an appeal was taken to the general term, where it was affirmed. The decision of the general term is reported (43 *N. Y. Sup. Ct.* 411), where the facts of the case are sufficiently detailed.

The order of arrest in question was obtained after the disposition of the cause at the special term, but before the affirmance of the special term judgment, which, however, had been affirmed at the time of the argument of the appeal from the order denying the motion to set aside the order of arrest.

J. M. Guiteau, attorney, and of counsel for appellants, among other things, urged:—I. It is not competent to arrest in the first instance in an equity case, because the judgment must be an equitable judgment.

Appellants' Points.

II. The reasoning that forbade an order of arrest in the case of *Lambert v. Snow* (17 *How. Pr.* 518), and *Madge v. Percy*, court of appeals, Dec. 11, 1875 (5 *Weekly Dig.* 593), in which the order was denied because two causes of action were united, ought to apply with equal force when numerous reliefs are asked for, as in this case.

III. The defendants, Clews and Fowler, are discharged from the debt against them, described in the affidavit on which the order of arrest was granted, and the other proofs used to sustain it in the court below.

IV. The debt is not one that comes within section 5117 of the Revised Statutes of the United States, providing that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt" (*Cronan v. Cotting*, 104 *Mass.* 245, and cases cited in the opinion of the court; *Owsley v. Cobin*, U. S. circuit court, South Carolina, 15 *N. B. R.* 489—Opinion by WAITE, Ch. J.; *Woolsey v. Cade*, 15 *N. B. R.* 238, supreme court, Alabama; *Grover v. Clinton*, U. S. circuit court, Wisconsin, 8 *N. B. R.* 312—Opinion by HOPKINS, J., concurred in by DAVIS, J.; *Chapman v. Forsyth*, 2 *How.*, U. S. supreme court, 208; *Neill v. Scruggs*, 17 *N. B. R.* 102, U. S. supreme court; *In re Smith*, 18 *Id.* 24, U. S. D. C., S. D. N. Y.—Opinion by CHOATE, J.). (a) The nature of the claim against the defendants Clews and Fowler is identical with the plaintiffs' claim in *Cronan v. Cotting* (104 *Mass.* 245). In that case the action was brought to recover for money received by the defendant to the plaintiffs' use. It was referred to an auditor, whose report showed that the defendant was administratrix of the estate of her husband, between whom, at the time of his

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decease, and the plaintiff, there were unsettled accounts; and the plaintiff sent to the defendant certain acceptances, with directions to apply the proceeds thereof, or such part as should be needful for the purpose, to pay whatever balance was actually due from him to the estate of the intestate. The defendant collected on account of the acceptances, and applied so much of the proceeds as was necessary to pay a balance, which she claimed was due to the estate. But the auditor found that the amount thus applied exceeded, by \$3,922.25, the balance actually due. After the judgment in the court below the defendant obtained a discharge in bankruptcy, which was pleaded in bar to said judgment. The plaintiff claimed, at the hearing before the court, that the relation between the plaintiff and defendant was that of a pledgor and pledgee, and that such being the relation, the debt sought to be recovered was created by the defendant while acting in a fiduciary character, and thus within the terms of said bankruptcy statute. The court held that the trust in that case did not constitute a fiduciary relation, and that the debt in that case was simply a debt by contract, and that the defendant sustained no fiduciary character to the plaintiff while acting, in which said debt was created. These defendants claim that the debt in the case at bar, likewise, is simply a debt by contract. In both this and the Massachusetts case, the defendants stood in the relation of pledgees, and in each case, by implication of law they were liable to the plaintiffs, to return to them or account for the pledged property, if any, there should be remaining after the debt or liability was extinguished for or on account of which said property was pledged. In each case the debt arose out of an implied contract. And it is claimed that the defendants, Clews and Fowler, sustained no fiduciary character towards the plaintiffs while acting, in which this debt was created.

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And it is claimed that the remarks of the supreme court of Massachusetts on this point are equally pertinent to the case at bar. Another ground of the decision in the Massachusetts case, was that the debt in that case was excluded from the class of fiduciary debts referred to in the statute, in consequence of the construction given by the United States supreme court in *Chapman v. Forsythe* (2 How. 202), to the phrase "while acting in any fiduciary capacity," which phrase the court considers the same as, "while acting in any fiduciary character." By the construction referred to, given by the United States supreme court, the phrase in question embraced cases of special, express or technical trusts of the same class as those enumerated in the bankruptcy statutes of 1841, viz.: "The defalcation of a 'public officer,' " "executor," "administrator," "guardian" or "trustee," and did not embrace implied contracts or those which the law implies from contract. The Massachusetts case decides the question, it would seem, upon what the court in *Woolsey v. Cade*, above cited, calls a "broader ground," and stated in *Chapman v. Forsythe* in these words, "if the act embraces such a debt it will be difficult to limit its application. It must include all debts arising from agencies, and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but a few debts on which the law could operate . . . but this is not the relation spoken of in the first section of the act." The other cases cited are to the same general tenor as the Massachusetts case, and the true construction of said section of the bankruptcy statutes should be deemed settled.

V. The construction of the bankrupt law (§ 5117, *supra*), must be the same in every State, without regard to the local law of the several States (*Grover v. Clinton*, 8 N. B. R. 489, by Judge HOPKINS, coincided in

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by Justice DAVIS of the supreme court of the United States; *Woolsey v. Cade*, 15 *Id.* 239; *Owsley v. Cobin*, 15 *Id.* 489, decision by Chief Justice WAITE, where, in the learned judge's opinion, he adopts, in so many words, the reasoning and conclusions of these decisions).

C. Bainbridge Smith, attorney, and of counsel for respondents, urged:—I. The cause of action against the defendants is to recover of them damages for the unlawful conversion of the plaintiffs' bonds (*Code of Civ. Pro.* § 549, subd. 2; *Id.* § 550, subd. 3).

II. It is now well settled that where the right to an arrest is identical with the cause of action itself, the court will not try the merits upon affidavits, unless the defendant makes out clearly such a case as would entitle him to a nonsuit or a direction of a verdict in his behalf (*Royal Ins. Co. v. Noble*, 5 *Abb. Pr.* 54, 56, and cases cited; *Merritt v. Hecksher*, 50 *Barb.* 451; *Faris v. Peck*, 40 *How. Pr.* 484).

III. So it is equally well settled that an arrest is not barred when a cause of action exists, on the ground that the plaintiff has accepted notes therefor (*Shipman v. Shafer*, 14 *Abb. Pr.* 447; *Pettengill v. Mather*, 12 *Id.* 436; *Murphy v. Fernandez*, 10 *Bosw.* 665; *Harding v. Shannon*, 20 *How. Pr.* 25).

PER CURIAM.—The finding upon the facts cannot be disturbed. Nor was the obligation on which the order of arrest was made, discharged by operation of the bankrupt act. There appeared on the argument to be a serious objection to granting an order of arrest in an action for an equitable cause. It was, however, answered, that the action, by the interlocutory judgment, had been turned into a pure action at law. This seems to be sufficient, especially since no reversal of

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that interlocutory judgment can take place, the judgment having been affirmed.

Order affirmed, with \$10 costs, and disbursements to be taken.

DAVID M. HUGHES, PLAINTIFF AND RESPONDENT,
v. THE CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, DEFENDANT AND AP-
PELLANT.

PLEADINGS.—PRACTICE.—ORDER REQUIRING DEFENDANT TO MAKE ANSWER MORE DEFINITE AND CERTAIN.

As a general rule, such an order is not appealable. *Held*, that in this case, the order made deprives the defendant of a substantial right.

The parts of the answer objected to are confined to denials, and the substance and form thereof. There is no attempt to claim any affirmative right from the plaintiff. In no instance in which the order directs the amendment of the answer, is there any doubt or uncertainty that the answer either puts in issue or admits the corresponding allegations of the complaint. *Held*, that no amendment is possible which would make the denial or admission any clearer, and the defendant should not and cannot be compelled to submit to the constructions which the plaintiff makes in the complaint of the trust deed, which was the foundation of the action.

The order should not have given the plaintiff leave, in case the defendants did not amend, to apply for judgment. The relief should not have extended beyond striking out the allegations complained of; for if these allegations were stricken out, there was still an issue left to be tried before the plaintiff was entitled to judgment. This part of the order affects a substantial right of the defendant, and is appealable.

Before SEDGWICK and FREEDMAN, JJ.

Decided March 14, 1879.

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Appeal by defendant from order requiring answer to be amended so as to make certain allegations more definite and certain.

The court ordered in terms that the defendant make its answer definite and certain in four specified particulars, and stated the means by which the answer should be made so. The defendant was commanded to deny or admit "directly and unequivocally" three specified allegations in the complaint. As to a fourth allegation of the complaint the defendant was, in one supposed condition of the facts, ordered to deny a specific thing, and in another supposed condition of the facts it was ordered to admit or aver another thing. It was likewise ordered to make "upon knowledge" one of the denials or admissions which it was ordered to make, and it was also ordered to make, "upon knowledge," another denial which it had, in the alternative, the privilege of making.

To these provisions of the order was superadded the penalty of allowing the plaintiff to apply to the court for judgment in case the defendant should make default in amending.

From this order the defendant appeals.

The pleadings are printed below, those portions of the answer to which the order applies being printed in italics :

The complaint alleges : *First*—That the defendant, the Chicago, Milwaukee & St. Paul Railway Company, is a corporation incorporated by and under the laws of the State of Wisconsin ; that it was incorporated under the name of "The Milwaukee & St. Paul Railway Company," which name the legislature of the State of Wisconsin changed to that of "The Chicago, Milwaukee & St. Paul Railway Company;" that it has an office and place of business, and property, in the city

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of New York ; that the causes of action herein set forth arose in the city of New York.

Second—That on or about November 30, A.D. 1864, the defendant, under the name of the Milwaukee & St. Paul Railway Company, became indebted to various persons and corporations in the sum of \$1,500,000, which indebtedness was evidenced by the issue and delivery of its bonds in the sums of \$1,000 each, to the amount above named, which bonds were dated November 30, 1864, and each of them contained a promise to pay the bearer the sum of \$1,000, lawful money of the United States, on October 1, A.D. 1884, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of April and October in each year, in the city of New York.

That to secure the payment of said bonds the defendant executed, acknowledged and delivered a mortgage or trust deed, dated November 30, 1864, to John P. Yelverton, and to the plaintiff, a copy of which said deed, except the signatures thereto and the acknowledgment thereof, is hereto annexed, marked Exhibit A, to which the plaintiff refers, and makes the same a part of this complaint.

That said Yelverton and the plaintiff accepted the trust established in and by said trust deed, and signed a certificate upon each of the above described bonds.

That since the execution and delivery of said deed, viz., on or about the day of , 1865, the said Yelverton died, leaving the plaintiff the sole surviving trustee ; that by the terms of said trust deed, all the powers and duties imposed in and by said deed, and all the compensations to be given for the performance thereof, devolved upon the plaintiff herein, as the survivor of said trustees.

That it was mutually agreed in said trust deed, that the defendant, for the purpose of ultimately paying or reducing the bonds secured by said trust deed or mort-

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gage, covenanted and agreed that it would, commencing on July 10, 1865, on or before the 10th day of October, January, April and July in each year, pay to said Yelverton and Hughes, trustees, or to the survivor of them, or to their or his successors or successor, as and for a sinking fund, the entire net income or earnings of the grain elevator erected by the defendant at Milwaukee, for the three months preceding the first day of each of said months above named.

The plaintiff avers, that as he has been informed by the reports of said defendant, and otherwise, and he verily believes, the net income and earnings of said elevator, from July 10, 1865, to February 1, 1878, without regard to interest thereon, was over the sum of \$1,500,000, and more than sufficient to pay the entire mortgage debt due to the plaintiff as trustee.

The net income or earnings of said elevator are shown by Exhibit B, hereto annexed, and made a part of this complaint.

That in and by said trust deed, it was further agreed by the defendant, with the plaintiff, that he, the plaintiff, should receive from the defendant, for his services in applying the money derived from said payments promised to be made by defendant, the sum of one-half of one per cent. on the par amount of bonds purchased or canceled, exclusive of costs and disbursements, all of which, on reference to said trust deed, will fully appear; which one-half of one per cent. upon the \$1,500,000 of bonds issued, amounts to the sum of \$7,500.

That plaintiff has always been ready and willing to perform the duties and trusts devolving upon him under said trust deed, and has often demanded of the defendant payment to him, as trustee, of the income of said elevator, in order that plaintiff might perform the duty of purchasing and canceling said bonds with said income, and otherwise comply with the provisions of

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said trust deed ; but said defendant has always refused to perform its covenants contained in said trust deed, and, disregarding its promises, covenants and agreements, as made therein, has never fulfilled its obligations therein made, and has never paid to the plaintiff the net income and earnings of said elevator, or any other sum ; but that, contrary to its covenants and agreements, it has itself, or by others than the plaintiff, purchased or redeemed said bonds, or the larger part thereof ; the exact number is to the plaintiff unknown.

All of which is to the damage of the plaintiff the sum of \$7,500, with seven years' interest thereon, on the average time from October, 1865, to this date ; amounting in all to the sum of \$10,725.

The answer is as follows : Defendant admits that it is a corporation, incorporated by and under the laws of the State of Wisconsin ; that it was incorporated under the name of the Milwaukee & St. Paul Railway Company, which name the legislature of the State of Wisconsin changed to that of the Chicago, Milwaukee & St. Paul Railway Company ; that it has an office and place of business, and property, in the city of New York.

It denies that the alleged causes of action in the complaint set forth arose in the city of New York, or arose at all.

It admits that on or about November 30, A. D. 1864, it, under the name of the Milwaukee & St. Paul Railway Company, became indebted to various persons and corporations in the sum of \$1,500,000, and that such indebtedness was evidenced by the issue and delivery of its bonds in sums of \$1,000 each, and that said bonds were dated November 30, 1864, and that each of them contained a promise to pay the bearer the sum of \$1,000, lawful money of the United States, on October 1, 1884, with interest at the rate of seven per cent. per

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annum, payable semi-annually on the first days of April and October in each year, in the city of New York.

It admits that, to secure the payment of said bonds, it executed, acknowledged and delivered a mortgage or trust deed, dated November 30, 1864, to John P. Yelverton and to the plaintiff, *and it believes, according to its present information, that a copy of the said deed, except the signature thereto and the acknowledgment thereof, is annexed to the complaint, and marked Exhibit A, but, for greater certainty, it begs leave to refer to the original, when produced.*

It admits that said Yelverton and the plaintiff accepted the trust established in and by the said trust deed, and signed a certificate upon each of the above described bonds.

It admits, that since the execution and delivery of said deed, the said Yelverton died, but avers, upon information and belief, that said Yelverton died on or about January 10, 1867, and denies that he died on or about the day of , 1865.

And it admits that when the said Yelverton died, he died leaving the plaintiff the sole surviving trustee; but upon information and belief, it denies that by the terms of the said trust deed, all the powers and duties imposed in and by said trust deed, and all the compensation to be given for the performance thereof, devolved upon the plaintiff as survivor of said trustee, and although it says it is true that all the powers and duties imposed in and by said deed would have devolved upon the plaintiff as survivor of the said trustee, if the plaintiff had continued to be competent to perform the duties of the said trust, or to perform the functions devolved upon the trustees in and by said trust deed.

It denies that otherwise than as expressed in said trust deed, it was mutually agreed in said trust deed as is in that behalf in the complaint alleged, and for

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the accurate terms of the agreement in that behalf, this defendant refers to the said trust deed or mortgage.

And upon information and belief, this defendant denies that the net income and earnings of said elevator, from July 10, A. D. 1865, to February 1, 1868, with or without regard to interest thereon, was over the sum of \$1,500,000, or that it was more than sufficient to pay the entire mortgage debt specified in the said mortgage; and, upon information and belief, it denies that the plaintiff has been so informed by the reports of this defendant, and it denies that the said entire mortgage debt is or was due to the plaintiff as trustee.

And, upon information and belief, it denies that the net income or earnings of said elevator are shown by Exhibit B, annexed to the said complaint.

And it denies that any agreement was made by this defendant with the plaintiff as to what the plaintiff should receive from the defendant for his services, for applying the money derived from said payments promised to be made by the said defendant, as in said complaint in that behalf alleged, otherwise than as appears by the terms of the said trust deed or mortgage.

It denies that the plaintiff has always been ready and willing to perform the duties of the trust devolved upon him under said trust deed, and, on the contrary, it alleges that the said plaintiff, in and about the year 1864, became and was disqualified to act as trustee under said trust deed, or to perform the duties or trust devolving upon him under said trust deed.

And, upon information and belief, it denies that the plaintiff has often demanded of the defendant payment to him as trustee of the income of the said elevator, in order that the plaintiff might perform the duty of purchasing and canceling the said bonds with said in-

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come, and otherwise comply with the provisions of said deed.

And it denies that it has always, or at any time, refused to perform the covenants in said trust deed, or that it never has fulfilled its obligations therein made.

It admits that it has never paid to the plaintiff the net income or earnings of said elevator, or any other sum.

It admits that it has itself, or by others than the plaintiff, purchased or redeemed said bonds, or a larger part thereof; but it denies that such purchase or redemption has been or is contrary to its covenants and agreements: and whether or not the exact number of the bonds purchased or redeemed by itself or by others than the plaintiff, is unknown to the plaintiff, it denies any knowledge or information sufficient to form a belief.

And it denies that any of the matters or things in the said complaint alleged are to the damage of the plaintiff in the sum of \$7,500, with interest thereon, or otherwise.

T. N. Bangs, for appellant.

C. D. Ingersoll, for respondent.

BY THE COURT.—SEDGWICK, J.—I regret that I am not able to agree to affirm the order appealed from. The order requires that the answer be made more definite and certain. As a general rule, such an order is not appealable. In this instance, however, I think it is impossible to make the pleading more definite than it is, in such respects as the defendant has a right to confine the pleading to, and that the order made deprives the defendant of a substantial right. The parts of the answer objected to are confined to denials, which put the plaintiff upon proof of his case, with perhaps one exception. There is no attempt to claim any affirmative

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right from the plaintiff. Now, to my mind, in no instance in which the order directs the amendment of the answer, is there any doubt or uncertainty that the answer puts in issue or admits the corresponding allegations of the complaint, and no amendment is possible which would make the denial or admission clearer. And in the instances referred to, I think the defendant had a right not to be forced to submit to the constructions which the complaint made of the trust deed which was the foundation of the action.

The complaint alleges "that to secure the payment of" certain bonds the defendant executed and delivered a mortgage or trust deed, dated November 30, 1864, to J. P. Y. and to the plaintiff; a copy of which deed is "hereto annexed," to which the plaintiff refers, and makes the same a part of his complaint.

The answer admits the execution and delivery of a deed dated November 30, 1864, to J. P. Y. and the plaintiff, and "it believes, according to its present information, that a copy of the said deed" "is annexed to the complaint," "but for greater certainty, it begs leave to refer to the original, when produced."

If there is any certainty as to the rules of pleading, it is certain that these allegations do not put in issue the fact of the deed. No denial, upon information and belief, or of any other kind, is attempted. As to the deed, it is certain that the answer requires no proof from the plaintiff. The answer reserves or claims a right to refer to the original, when produced. There is no uncertainty as to the terms of this claim. It does not affect any preparation that the plaintiff should make for trial. Whether the allegation is redundant or irrelevant was not discussed, nor did the motion below make a claim that it was. It appears to be an effort to claim a remnant of a right that a defendant had, to require before pleading the production of the deed itself,

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in order that among other things he might see the seal, the mode of execution and the witnesses. For before that sight he was not conclusively bound, as it is said he is now bound, to know whether or not he made the deed. In this present instance, it is to be remarked that the complaint avowedly omits the signatures and acknowledgment. If it were irrelevant or redundant, it would be simply stricken out on motion of a party aggrieved by it, but the order directed "that the same be made definite and certain by the defendant directly and unequivocally denying or admitting on knowledge the alleged copy to be a true copy." This order trenches upon the system of pleading in the Code, for that does not call for a direct and unequivocal denial or admission. There is a right of making no reference to the allegation of the complaint, and that, while it results with certainty in an admission, is not a direct admission. Moreover, in effect, the order relieves the plaintiff of something which at least is as much his duty as it is the defendant's. Both sides admit the making of the deed. Why should the plaintiff call upon the defendant to verify the accuracy of the copy, or to admit or deny its accuracy, when he has himself already undertaken to vouch for the accuracy, by setting it out as a copy.

It seems to me, that substantial justice is with the defendant. The plaintiff places his rights solely upon the original deed. The defendant does not deny that a copy is annexed to the complaint, but only asks that, when produced, the original deed may be referred to.

I do not, however, think, if the order had not given leave (in case the defendant did not make this allegation certain) to the plaintiff to apply for judgment, that this part of the order would be appealable. No substantial right of the defendant would have been affected.

As to the next amendment ordered, I am of opinion

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that the uncertainty and indefiniteness were on the part of the plaintiff, not of the defendant.

The complaint had set out what was the agreement, by setting out the terms of the deed. It was unnecessary and redundant to re-state what was contained in it. It would have been proper for the plaintiff to allege that it was covenanted or agreed by a certain deed, &c., without setting out the terms of the deed. At the least, if he proceed to re-state the contents of the deed, he should do it in conformity with the terms of the deed, and accurately. But the complaint alleged that "it was mutually agreed in said trust deed that the defendant covenanted and agreed that it would pay to the trustees the net income of the grain elevator," &c. It is hardly necessary to say that there was no mutual agreement that the defendant covenanted, &c. It was a covenant by defendant. Probably this was a mere slip of the pen, but there was no obligation on the part of the defendant to correct the complaint, and in the exercise of an undoubted right, not evasively, but in direct accordance with the truth and with no uncertainty of allegation, the answer denies that otherwise than as expressed in said trust deed, it was mutually agreed in said trust deed, &c., and justified by the incorrect allegation of the complaint says: "for the accurate terms of the agreement in this behalf, this defendant refers to the said trust deed or mortgage." This also shows, that so far as the accuracy of the copy was concerned the defendant had a sort of justification for referring to the original, as was done in the former part of the complaint. This denial did not in any manner embarrass the plaintiff. The trust deed was enough for his action.

The next amendment refers to this part of the complaint, viz.: "that, as he has been informed by the reports of said defendant, and otherwise, and he verily believes, the net income and earnings of said elevator

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from, &c., without regard to interest thereon, was over the sum of \$1,500,000, and more than sufficient to pay the entire mortgage debt due to the plaintiff as trustee." It is evident that the allegations of the answer are definite and certain. They are "and upon information and belief, this defendant denies that the net income and earnings of said elevator, &c., with or without regard to interest, was over the sum of \$1,500,000," "or that it was more than sufficient to pay the entire mortgage debt specified in the said mortgage." They may have the defects of a negative pregnant, but that does not imply indefiniteness. That was formerly attacked only by special demurrer, and in substance, it is an omission to deny some fact that may exist consistently with the negative allegation, and which is enough to give an action (1 *Chitty's Pl.* 536, 613). There is no doubt of the omission and no uncertainty.

But it is said that the defendant is bound to know what was the income of the elevator, and should therefore allege what it was. If this be so, it does not tend to uncertainty in what is alleged. Nor is the presumption of knowledge any different in case of a corporation, than it is of a natural man. For the purpose of legal responsibility the owner of an elevator would be held to know what the income of it was, but he might not have actual knowledge. His agents might operate it. If he himself signed a note or deed, the nature of the act is entirely different.

It does not appear that any report of defendant was such as to bind them absolutely if there were a mistake as to the fact. The plaintiff's rights do not rest upon the report, but upon the fact. One year, one set of officers may make a report of the net income, which may be mistaken in amounts received, and in the amounts to be charged to ascertain the net income. Cannot another set of officers and even the same, allege that the net income was not as the report stated? But,

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there is no presumption, but that the reports sustain exactly what the answer says by denial, that at least the income was not over a certain sum, alleged by the complaint. The answer, in making the alternative allegation, pursues, in my opinion, the usual and proper mode of pleading.

Another amendment relates to this part of the complaint, viz. :

That in and by said trust deed it was further agreed by the defendant, with the plaintiff, that he, the plaintiff, should receive from the defendant for his services in applying, &c., the sum of one half of one per cent. on &c., all of which, on reference to said trust deed, will fully appear, &c.

On referring to the trust deed, it appears that the agreement was that the trustees, their successors or survivors, should have the compensation, the commissions to be in full payment of both trustees, and to be equally divided between them. This is not an agreement that the plaintiff, one of the trustees, shall have the compensation. The defendant might have simply denied the allegation, but instead thereof, says in certain definite and unequivocal language that he denies that there was any other agreement for compensation for the plaintiff's services than such as the trust deed shows. The plaintiff, instead of being content with the unequivocal words of the deed, gives an erroneous construction of it, and cannot complain that the defendant takes proper means to prevent its being bound by that erroneous construction.

It should be noticed that here the plaintiff does what he has complained of the defendants doing. He says, "all of which on reference to said trust deed will fully appear."

In fine, I am not able to see how the defendants could make his allegations more definite, whatever other objections you may suppose.

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I am further of the opinion that the order should not have given the plaintiff leave, in case the defendants did not amend, to apply for judgment, and that the relief could not have gone beyond striking out the allegation. If these allegations were out, there was an issue left to be tried before the plaintiff was entitled to judgment.

I think the order should be reversed, with \$10 costs and disbursements to be taxed.

FREEDMAN, J., concurred.

ABRAHAM L. BATTERSON, PLAINTIFF AND RESPONDENT, v. SAMUEL T. W. SANFORD, DEFENDANT AND APPELLANT.

EXAMINATION OF PARTIES TO AN ACTION BEFORE TRIAL.

An objection to giving testimony, on the part of a defendant before trial, on the ground that it would tend to criminate the witness, should be heard and passed upon at the examination itself.

It should clearly appear, from the affidavits and papers upon which the order is founded, that it was the purpose of the moving party *to use the testimony upon the trial*.

Affidavits that state that the plaintiff cannot safely proceed to trial without defendant's deposition, that the testimony is material and necessary to enable plaintiff to prepare for the trial of, and to safely try the action; yet nowhere states that it is the intention of the plaintiff *to use the deposition or the testimony on the trial* are defective. They imply an intention not to use the testimony on the trial.

Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

Appeal from an order denying the defendant's motion to set aside an order for the examination of defendant before trial.

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P. H. Vernon, for appellant, among other things urged:—In every application for an order for the examination of an adversary before trial, the statutory conditions must be strictly complied with, and in case an order should be inadvertently made, without such compliance on the part of the applicant, it should be vacated even without regard to the merits of the application. Section 872 of the Code of Civil Procedure requires “the person desiring to take a deposition,” to present an *affidavit* setting forth among other things as follows: “4. . . . that the testimony of such person is material and necessary for the party making such application, or the prosecution or defense of such action,” but the affidavit of *W. I. Butler, Esq.*, the attorney for the plaintiff herein, upon which the order in question was granted, fails to comply with this requirement. It only alleges that the testimony and examination of the defendants “are material and necessary to the plaintiff to enable him to prepare for the trial of, and to safely try this action, and to obtain justice between the said parties,” and such an allegation is not sufficient (*Beach v. Mayor, &c.*, 4 *Abb. New Cas.* 236–240, supreme ct., gen. term reversing, 3 *Id.* 113). In this case, *DAVIS, P. J.*, says: “An affidavit to obtain an order for an examination before trial, must comply with the statute and state the particulars required. The order should not be granted when sought for, mainly *not as a deposition to be used on the trial, but as a means of ascertaining information to enable the applicant to look up other witnesses.*”

W. I. Butler, for the respondent.

BY THE COURT.—SEDGWICK, J.—I am of opinion that the learned judge held correctly, in the circumstances of this case, that although an objection to

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giving evidence that might tend to criminate the witness should be heard and passed upon in the examination itself, it was not sufficient ground for setting aside the order.

But it seems to me that the affidavit for plaintiff did not show that the defendant was to be examined as a witness before trial. They disclosed no purpose of using his testimony upon the trial, and this, I think, should clearly appear in every like case.

The affidavits say that the plaintiff cannot safely proceed to trial, cannot properly prepare for trial without defendant's deposition, that the testimony is material and necessary to the plaintiff to enable him to prepare for the trial of, and to safely try this action; but they nowhere show an intention to use the deposition on the trial. The intention not to use it, then, is implied.

For this reason, the order appealed from should be reversed, with \$10 costs, and disbursements to be taxed.

VAN VORST, J., concurred.

GEORGE F. VIETOR, ET AL., PLAINTIFFS AND RESPONDENTS, v. THE INTERNATIONAL NAVIGATION COMPANY, DEFENDANT AND APPELLANT.

COMMON CARRIER.—LIMITATION OF LIABILITY TO INVOICE PRICE.

WHAT ALLEGATIONS AND PROOFS DEPRIVE A PARTY OF THE BENEFIT OF SAID LIMITATION.

Estoppel. What acts or statements on the part of the common carrier, tending to apprise the consignee of the arrival

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of the goods in question, and readiness to deliver the same, are sufficient to induce the consignee, believing the same, to make entry at the Custom House and pay duties on the same, so that afterwards, the carrier being unable to deliver said goods or account for the same, he would be deprived of such limitation, and be compelled to pay the *invoice price* of the goods, with the duty and interest on the same added thereto.

The facts and the rulings of the court thereupon, as also the rules of law and decisions applicable to carriers, their liabilities, and to equitable estoppels, are fully set forth and discussed in the opinion of the court.

The court held, in this case, that the carriers were only liable for the invoice price of the missing goods.

Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

Appeal from judgment entered on verdict for plaintiff, directed by the court.

The complaint stated, as a first cause of action, that there were delivered to the defendant at Aix-la-Chapelle twelve bales of cloth, which the defendant agreed to transport to New York and deliver there to the plaintiff, under a certain bill of lading particularly set forth; that they did not transport, &c., the said bales, but "so negligently and improperly conducted itself in the premises" that, although delivering ten of said bales, it failed to deliver the remaining two bales, "and the said two bales, through the negligence and improper conduct of the said defendant, were wholly lost to the plaintiffs herein;" that "the invoice value of the said two bales of cloth so lost and not delivered as aforesaid, is the sum of \$1,074.40, in gold coin of the United States, for which amount, with interest from, &c., judgment is hereby demanded."

It stated, for a further and second cause of action, after reiterating the allegation of the first cause of

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action, that, on the arrival of the steamship named in the bill of lading, the plaintiffs received from the defendant notice of the arrival of said steamship and of said twelve bales ; that defendant entered on the manifest of the said steamship all of said twelve bales, and on July 17, 1876, filed said manifest, in pursuance of law, in the custom-house of the port of New York ; thereupon, on July 18, 1876, these plaintiffs paid to the United States the legal duties on all of said bales so entered on said manifest, including duties on the said two bales, which afterwards were not delivered to plaintiffs, which latter duties amounted to \$787, in gold coin of the United States, and thereupon received from the said United States a permit for the landing of said twelve bales ; that the plaintiff, on the production to the defendant of said landing permit, received from it a delivery order on their agent in charge of said steamship for all of said twelve bales, and, on duly presenting the same, received from the said defendant only ten bales, as aforesaid ; that, by the revenue laws and customs at the port, &c., unless the duty be paid within twenty-four hours after the arrival of a vessel, the goods therein are sent to the public store-house, and thereby an additional expense is incurred ; that the plaintiffs, desiring not to incur such expense, "relying upon the aforesaid notice received from the defendant, and upon the manifest of the defendant filed in the custom-house at, &c., and the other acts and doings of the defendant, paid said duty as aforesaid, in order to obtain possession of their goods and to prevent their being sent to the public store-house ;" that the government of the United States declined to refund to these plaintiffs the sum of said duties, unless these plaintiffs furnish positive proof that the said two bales were never shipped on board the said steamship at her port of departure, viz. : Antwerp ; that the plaintiffs are unable to comply with this condition, unless proof be

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furnished by the defendant and its agents; but the defendants, although often requested, have totally failed and neglected so to do, to the damage of the plaintiffs in the sum of \$878.49 lawful currency, which these plaintiffs paid for the gold, in which the duties were paid; whereupon, &c.

The answer admitted the defendant's liability for the damage set out in the first cause of action, "which, with the interest, the defendant has always been ready to pay, and has offered and now offers to pay to plaintiffs, who have always refused to receive and accept the same."

As to the second cause of action, the answer alleged good faith on its part in all the acts and doings in regard to the transaction; that defendant had no knowledge or information that the two bales were not on board.

At the trial, it appeared that, on the arrival of the steamship, a clerk of plaintiff saw in a newspaper an advertisement as follows:

"Notice. Red-Star Line, Steamship Kenilworth, from Antwerp, will commence discharging under general order at Pier 53, N. R., on Wednesday, July 19, at ten o'clock. Consignees will please send their permits on board and attend to receipt of goods without further notice. All goods remaining on the dock are at the risk of owners or consignees. All persons are hereby cautioned, &c.

"GEO. W. COLTON, Agent."

This was the notice referred to in the complaint, as notice of the arrival of said steamship and of said twelve bales. The clerk saw it on July 18. The vessel had been entered at the custom-house on arriving, on the 17th. By the testimony, if goods were not taken away from the vessel within forty-eight hours after the

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entry of the ship, they would be sent to a public store. To prevent such sending, it was necessary within the forty-eight hours to pay the duties and obtain a permit to land the goods, and to act upon the permit within the forty-eight hours. The dock clerk of the defendant would not allow goods to be taken from the dock without a "delivery order" obtained from the proper agent of the defendant. Generally, a delivery order would not be made until the custom-house permit was exhibited; but exceptions were made to this in case of large dealers like the plaintiffs, who could be trusted.

The clerk of plaintiffs, on seeing the advertisement, went to the office of defendant and applied for a delivery order. It was made up from a list of goods, which list had been made from counterpart bills of lading in possession of defendants. The defendants had no right to keep the goods until payment of freight, for the goods were free of freight. The plaintiff's clerk thought that the officer he applied to could not have been on the vessel to see if the goods were on board. No facts were given in evidence to show that plaintiffs had any reason to believe that the vessel had been so far discharged that it was possible for the defendant's agents to know whether the whole of plaintiff's goods were on the vessel. On all the facts a jury would not have been justified in finding that there was an opportunity on the part of defendant's agent to know what the fact was.

Plaintiff's clerk received an order directed to the dock clerk in charge of the vessel, viz.: "Please deliver to Vietor & Achelis sixty-nine packages merchandise per steamship Kenilworth, marked as follows." The marks comprised the marks by which all the twelve bales were designated upon the bills of lading.

No agent of plaintiffs, nor any one of them, saw the manifest of the cargo, that had been made in Ant-

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werp and filed in the custom-house, on arrival of ship.

Plaintiffs' clerk, after receiving the delivery order, entered the goods at the custom-house and paid the duties on them all. The duties upon the two bales amounted to the sum stated in the complaint. He also obtained the custom-house permit, certifying that duties had been paid, and stating, "Permission is accordingly given to land" the goods. This was on July 18. On the same day, plaintiffs' clerk delivered to the custom-house inspector in charge of the steamship the custom-house permit to land the goods, and to a carman the delivery order for the clerk at the dock. The carman did not receive the two bales. The defendants were not able to deliver them. No facts were given to account for the non-delivery or any loss of them.

On the trial the defendants admitted that they were liable in the invoice value of the goods. The plaintiffs claimed for the invoice value \$1,074.40 in gold, and interest from June 29, 1876, on first cause of action, and for the amount of customs duties \$878.49, and interest from July 18, 1876, on second cause of action. The court directed a verdict for plaintiff in both amounts, and judgment accordingly. The defendants duly excepted.

Benedict, Taft & Benedict, attorneys, and *E. C. Benedict*, of counsel, for appellants, urged:—I. The defendant admits the non-delivery of the two bales in question, but pleads the limitation of its liability to the *invoice price*, as stipulated in the bill of lading. Of the benefit of this limitation it can be deprived only by allegation and proof of: 1. Fraud and deceit on the part of defendant, or its agent. 2. Conversion by the defendant. 3. Misfeasance or abandonment by defendant of the character of carrier (*Magnin v. Dins-*

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more, 70 *N. Y.* 410, 417). *a.* The complaint contains no allegation of fraud or deceit, or of any intent by defendant to defraud or deceive, nor was any proof thereof attempted. *b.* It contains no allegation of a conversion, nor was any proof thereof attempted. *c.* It contains no allegation of misfeasance, or of an abandonment of the character of carrier, by the defendant, nor was any proof thereof attempted. The evidence is uncontradicted that everything done by the defendant and its agents was done without intent to defraud or deceive, and in good faith. *d.* It contains no allegation of any facts from which fraud, deceit, conversion, misfeasance, or abandonment of the character of carrier could be drawn inferentially, nor was any evidence given tending to show such facts. *e.* The pleadings and proofs disclose simply non-delivery of the goods. Such non-delivery unexplained amounts in law to negligence, rendering the carrier liable *under the bill of lading*, but confining his liability to the terms thereof (*Magnin v. Dinsmore*, 70 *N. Y.* 410, *supra*. See *Marsh v. Falker*, 40 *Id.* 567).

II. It is alleged in the complaint that the plaintiff, "relying upon the aforesaid notice received from the defendant," (viz., the advertisement of the arrival of the vessel in the *Journal of Commerce*, "and upon the manifest of the defendant filed in the custom-house, at the port of New York, as aforesaid, and the other acts and doings of the defendant, paid said duty as aforesaid." But neither the notice so advertised, nor the manifest filed, nor any of the acts or doings of the defendant, constituted any representation as to these goods upon which the plaintiffs had any right to rely, nor was any such representation intended thereby by the defendant or its agents. 1. The notice advertised was simply a notice that the vessel had arrived, and would begin to discharge at a specified time. 2. The manifest filed was made up from the bills of lading, not

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from actual inspection of cargo, which was impossible. This fact was known to Fisher, plaintiffs' clerk, who represented the plaintiffs in this matter. The manifest was therefore (as plaintiffs knew) only a list made up from bills of lading, and constituted no representation. 3. The delivery order was made up from the bills of lading, and not from or after an inspection of the cargo: that fact was known to plaintiffs' clerk. It constituted no representation; it was simply a notice to the dock-clerk that freight had been paid, and he was at liberty to deliver. 4. The delivery order had no reference to the payment of duties. The defendant and its agents had no knowledge or idea that it would be used with reference to payment of duties. The evidence is uncontradicted that neither the defendant nor any of its agents knew that the two bales were missing until after the filing of the manifest, the giving of the delivery order, and the unloading and delivery to plaintiffs of the goods consigned to them. The bill of lading is not a representation; it is a promise or contract to carry, but not a representation that defendant had carried and could deliver. Neither the manifest, the notice of arrival and discharge of vessel, nor the delivery order was a representation that defendant had carried and could deliver.

III. Nothing was done or said by defendant or its agents, constituting a representation upon which the plaintiff had the right to rely in paying duties (see *Alston v. Mechanics' Mutual Ins. Co.*, 4 *Hill*, 329). Fisher, plaintiffs' clerk, who obtained the delivery order, and who attended to the entry of the goods and payment of duty, admits that he knew that the manifest and the delivery order were made up from the bills of lading, and not from an inspection of cargo; it follows, then, that he did not consider them, or either of them, as a representation that the goods were on the vessel and could be delivered.

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IV. Plaintiffs did not rely upon any representation in paying duties.

V. 1. The defendant is not estopped from setting up the limitation of liability contained in the bill of lading. The bill of lading does not constitute an estoppel (*Bates v. Stanton*, 1 *Duer*, 79). Nor does the manifest, nor the delivery order, as they were simply transcripts from the bills of lading. 2. An equitable estoppel is not created by any representation or admission, unless the party making such representation or admission means it to be acted upon, and it is acted upon accordingly (*Freeman v. Cooke*, 2 *Exch. R.*; *Young v. Bushnell*, 8 *Bosw.* 1). 3. All the elements necessary to constitute an equitable estoppel are wanting (see *Dezell v. Odell*, 3 *Hill*, 215, and cases cited; *Brown v. Bowen*, 30 *N. Y.* 519; *Baker v. Un. Mut. Ins. Co.*, 43 *Id.* 283; *Kingsley v. Vernon*, 4 *Sandf.* 361).

Blatchford, Seward, Griswold & Da Costa, attorneys, and *C. M. Da Costa*, of counsel, for respondents, urged:—I. The exception to the direction of a verdict under the first cause of action fails, of course, because the answer admits the liability therefor.

II. The court was equally justified in directing a verdict for the amount claimed under the second cause of action. On the undisputed evidence, the direction was right, and the plaintiffs were entitled to recover, on the elementary principle of an estoppel *in pais*, for it appeared beyond question that on the ship's manifest, filed in the custom-house, the defendant entered all of the bales; that the defendant gave to plaintiffs a delivery order, representing that all of the bales of goods consigned to them were on board; that the plaintiffs would not have entered all the goods, or paid the duties on all the goods, had the defendant, at the time the delivery order was given, informed them that two of the bales were short, or had so stated on the

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said manifest or delivery order, or had given them any reason so to believe; that relying upon the statements contained in such delivery order, and the silence of the defendant in that respect, the plaintiff did enter the twelve bales, and did pay the duties thereon; that, subsequently to such payment, the defendant discovered its inability to deliver all of the goods, two bales being missing and wholly unaccounted for; that application was made to the government to refund the duties paid on such bales, which were never received by the plaintiffs, and that the government refused so to refund unless it were furnished with positive proof that the two missing bales had never been shipped on the *Kenilworth* at Antwerp, which evidence was alone in the possession of the defendant; and that the defendant, though requested to furnish such proof, has refused, and (in view of the testimony of its officer above alluded to) has willfully refused so to do. On these facts, therefore, the well-known principle of an estoppel *in pais* is applicable, and it is on that ground that the plaintiffs have proceeded, and seek to enforce the liability of the defendant (2 *Pars. on Cont.* 6 ed. 793; in note *q*, on same page, all the authorities are collated; *Costello v. Meade*, 55 *How. Pr.* 356, 358; *Cornish v. Abington*, 4 *H. & N.* 556, per BRAMWELL, J.; *Continental Bank v. Bank of the Commonwealth*, 50 *N. Y.* 575). It was held in *Blair v. Waite* (69 *N. Y.* 113): "It is not necessary to an equitable estoppel that the parties should design to mislead. It is enough if the act or declaration was calculated to, and did, in fact, mislead another, acting in good faith and with reasonable diligence." And the same doctrine was reiterated in *Morgan v. Railroad Co.* (96 *U. S.* 716); also in *Merchants' Bank v. State Bank* (10 *Wall.* 604, 645). "It seems," says *Bigelow on Estoppel* (p. 170), "to be settled that a party's ignorance of the truth of a representation made will not remove the estoppel if he

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was bound to know the fact, or if his ignorance is the result of gross negligence." It will hardly be claimed that a common carrier is not bound to know the fact whether or not he has lost goods; and certainly his utter ignorance on the subject is gross negligence within all the authorities.

III. The proof required by the government before it would refund the duties was exclusively within the power of the defendant to furnish. The plaintiffs applied to the defendant to furnish it, and it has failed to do so. The defendant has therefore been willfully negligent in the premises. The testimony of the defendant's agent, Mr. Colton, that, so far as he knows, all efforts to get any trace of the missing bales have been unavailing, will not militate against our contention. Had the witnesses, who, it is to be presumed, were the only persons who knew anything about it, been examined, or tendered for examination, the truth would probably have been arrived at, and the liability of the defendant either absolutely fixed, or the proof furnished to the government, on the production of which it had expressed its willingness to refund the duties paid for the missing bales.

IV. But, irrespective of the foregoing, the direction of the court was right. The bill of lading did not in terms exempt the defendant from loss arising from negligence. The clause of the bill of lading limiting the liability, in case of damage, loss or non-delivery, to an amount not to exceed the invoice value of the goods, does not apply to cases of loss by negligence; because, neither by such terms, or by any other terms contained in the bill of lading, is a loss by negligence exempted or limited. It is perfectly well settled that, while a carrier may exempt himself from loss by negligence, he must, if he so desires, exempt himself by positive words, and that general words, limiting his liability, will not be construed to include losses in-

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curred by negligence (*Magnin v. Dinsmore*, 56 *N. Y.* 168; *Mynard v. Syracuse, &c. R. R.*, 71 *Id.* 180, where all the authorities are collated). The defendant being unable to furnish any proof of the loss of the two bales, or to account for their loss in any way, was *prima facie* guilty of negligence (*Steers v. Liverpool, N. Y. &c., Co.*, 57 *N. Y.* 1; *Fairfax v. New York Central & Hudson River R. R. Co.*, 67 *Id.* 11).

BY THE COURT.—SEDGWICK, J.—It was agreed at the argument, that if, upon the plaintiff's paying the duties in question, he had no cause of action for the duties, the subsequent omission or neglect of defendants to furnish proof sufficient to obtain from the government a repayment, did not give an action.

The learned counsel for appellant argued that the verdict could be maintained if the proof showed such negligence in respect of the loss of the two bales, that the plaintiff would be entitled, in an action on the bill of lading, or on the case, to recover the full value of the goods, which would include the invoice value and the duty combined; without inquiring into the validity of this proposition, the case shows that the recovery of the duties was not placed on that ground. The complaint made two causes of action. Damages were stated and calculated on the trial, as if arising from two causes of action. There were, in fact, two recoveries. The general course of the trial shows that no claim was then made, that in an action on the bill of lading, the plaintiff was entitled to recover, under any measure of damages other than that stated in the contract, viz.: the invoice value of the goods. Neither the law nor the facts were investigated in a manner appropriate to a claim that negligence on the part of the defendant would give greater damages than the invoice value.

Another ground on which the judgment was maintained by the learned counsel for the respondents, was

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that the conduct and silence of the defendants' agent, together with the contents of the delivery order issued to the plaintiff, led him to believe that the goods had actually arrived and were ready to be delivered, and, relying upon that as a fact, to pay the duties on them to the United States. It was claimed that the rules that prevail in an estoppel *in pais* were to be applied to this state of facts, and made the defendant liable for the amount of duties.

It attracts attention at once that an estoppel operates to prevent a party from asserting the non-existence of a fact, that he formerly asserted did exist. If the effect of the acts, or silence of defendant's agent, was to lead the plaintiffs to believe that the cloth had arrived, an estoppel would prevent the defendants from showing that they had not arrived. It is only necessary to observe that such an estoppel would not be at all relevant to the case here.

It may be imagined, that, if the defendant was estopped to show that the goods had not arrived, then, in an action on the bill of lading, or rather on the case, for the two bales of cloth, the defendants might have to meet a claim that they, having the two bales, refused to deliver them, and were therefore liable for their conversion and their value at the time and place of conversion. Of course, under the views that have been expressed, as to what was the real nature of the action, and what the trial of it involved, it is impossible to pass upon such a question here. A cause of action cannot be split, and if there be any recovery upon it, the rights of the parties are finally settled. Nevertheless, an inquiry as to the right of the defendant on the case made, will involve considerations that would be pertinent to the claim of estoppel, on the same facts in any action.

I will ask if the facts below showed certain things, that must exist, to create liability on the part of de-

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fendant? Is it proven that the defendant's agent did or said anything which was equivalent to an assertion that the cloth had arrived and was ready to be delivered, or was the delivery order and the silence of the defendant's agents calculated to lead the plaintiff to believe that the defendant's agent meant to represent that he knew that the cloth had actually arrived? Did the defendants intend that their act or silence should influence the plaintiffs in the matter of paying the duties, or did they know or have sufficient reason to believe that the plaintiff meant to be influenced in paying the duties forthwith, by what the defendants did, in issuing the delivery order?

It is undoubtedly law, that it is not necessary to an equitable estoppel that the party should design to mislead. It is enough that the act was calculated to mislead, and actually did mislead, the party while acting in good faith and with reasonable diligence. This was said to be the law in *Blair v. Wait* (69 *N. Y.* 116), and to support it the *Mechanics' & Traders' Bank v. Hazard* (30 *N. Y.* 226), was cited. In *Blair v. Wait*, the rule was applied to the fact that plaintiff had said to one of the defendants, that a third person was the owner of a judgment, and that if the defendants settled with him it would be all right, and accordingly the defendants did settle the judgment. Thereupon the plaintiff was estopped from an action on the judgment, although he may have been the owner. It was clear that the plaintiff intended that what he said should influence and be acted on by the defendants.

In *Continental Bank v. National Bank of the Commonwealth* (50 *N. Y.* 577), Judge FOLGER said that there need not be an intention to mislead, and applied the principle to the assertion of plaintiff's teller, that a check having on it his forged certification was all right. The facts spoke for themselves that the teller intended that the clerk who asked him the question

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should act on what he answered. Judge FOLGER cited *In re Bahia & S. P. Railway Co.* (*Law R.* 3 Q. B. 584), saying it held that if a representation is made with the intention that it shall be acted upon by another, and he does so, there is an estoppel.

In *Manufacturers' & Traders' Bank v. Hazard* (30 N. Y. 226), the case above cited, Judge JOHNSON said it was not necessary to an equitable estoppel that the party should design to mislead. The facts were that the defendant had written his Christian name, as indorser of a note, in such a manner that the notary in sending notice of protest read it A. C. instead of M., which was the real initial. The defendant was held to be estopped from setting up a defense that the notice was not addressed to him. The defendant knew and intended that whoever should act upon his indorsement would act upon it as he wrote it.

In *Brown v. Bowen* (30 N. Y. 541), Judge MULLIN said, that to establish an estoppel *in pais* it must be shown that the person sought to be estopped had made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence another.

In *Payne v. Burnham* (62 N. Y. 72), CHURCH, Ch. J., said, an indispensable requisite of an estoppel *in pais* is, that the conduct or representation was intended to influence the other party. The same language has been used in *Wilcox v. Howell* (44 N. Y. 398), *Welland Canal Co. v. Hathaway* (8 Wend. 483), *Dezell v. Odell* (3 Hill, 222), *Reynolds v. Lounsbury* (6 Id. 534), *Carpenter v. Stilwell* (11 N. Y. 61), *Otis v. Sill* (8 Barb. 108).

The actions in the nature of deceit are founded upon intentional misleading. Apart from fraud, there would be no foundation for responsibility in cases of words spoken, of a legal kind, unless the person speaking knew or believed that another was about to act

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upon what he said, and therefore, when he spoke, intended to influence the other. The evidence as to this intention is in the facts of the case, and, as one of them, the character and form of the matter claimed to be an estoppel. If the character is such as is likely to influence, the presumption is that the probable effect was intended. An intention to influence is consistent with no intention to mislead.

Undoubtedly, if the person charged referred in his speech or conduct to one object, disclosed, and there is another undisclosed object not brought to his attention directly or circumstantially, an equitable estoppel would not operate to bind him for the consequences connected with the undisclosed object. There could be no intention to influence as to the undisclosed object. As against him, no person could claim that he was justified in thinking that the other knew or was bound to know that he would act in reference to a matter not disclosed. The one alleging the estoppel as part of the burden of proof, must show to what subsequent course the alleged estoppel was meant to refer.

It will, no doubt, be admitted that the foundation of an estoppel is the assertion of the existence of a thing as a matter of knowledge, to this extent, at least, that no matter how positive in form the assertion is, nevertheless, it does not operate as an estoppel, if it appears that in substance the assertion is an inference from something, and the person addressed knew, or had reason to know so.

The facts were, that when the plaintiffs' clerk applied to defendant's clerk for a delivery order, he stated nothing as to his object, excepting that he wanted it. He chose his own time for the application. There was nothing to except the incident from the usual methodical routine of business. He was entitled to receive the delivery order at any time he saw fit to ask for it. The main object in issuing delivery orders

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was to show the dock-clerk that, so far as the company was interested, he might allow carmen to take away goods, or, in other words, that freight had been paid. To the most of persons who held bills of lading, delivery orders were not issued before the custom-house permit was shown, but to persons of character and responsibility, and among them the plaintiffs, it was usual, as matter of convenience, to issue the delivery order whenever it was requested, before or after the custom-house permit was obtained. The freight in this instance had been paid or secured at Aix-la-Chapelle, and the defendants would have had no reason to delay issuing the order. Indeed, in the present case, there was no reason for the defendants' clerk to think, if the matter of duties had come up to his mind, that they had not already been paid. With not uncommon activity, the duties might have been paid. The defendants' clerk had no reason to think of what had been or would be the plaintiffs' conduct as to duties. And the delivery order might have been asked for before the hatches were open or the ship really moored to the dock. No proof was given as to this matter.

The substance of the face of the delivery order was a release or waiver of any claim by defendants to detain the goods. Addressed to its clerk, it was necessary to give the number of the packages, and the marks upon them, to prevent the goods of others being delivered by mistake. If there were no chance of such an accident, the order might as well have said all the plaintiff's goods, or all the cargo, or anything equivalent. Its purpose was known to plaintiffs, and the meaning of its terms must be found from its intended operation. It was permissive and in the nature of a release; there is no more reason for supposing that there was an assertion that the particular goods had arrived and were on hand, than there is in the case of a quit claim of land

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with no covenants, for saying that it is an assertion that there is an estate in the land. A controlling and most significant fact is that to the knowledge of both clerks there was an unexecuted contract between the principals, the consummation of which was to be in the future, viz., the goods themselves were thereafter to be delivered or demanded. Perhaps the clerk had no power to waive any of defendant's rights under the contract; but if he had, the transaction of giving the delivery order was evidently not intended by either to affect the contract rights of the parties as it would be affected by an admission that the goods had actually arrived.

I am further of opinion that the testimony shows that the defendant's clerk did not mean to assert that he knew the cloth had in fact arrived. Plaintiffs' clerk himself testified, that he thought defendant's clerk could not have been on the vessel to see if the goods were on board. The witness said, that was improbable. It was more than improbable. There was only a bare possibility of the improbable incident, that the clerk, who had no duties connected with the ship, should have seen the ninety-nine pieces specified in the order. When he was applied to for the delivery order, he forthwith and in the presence and to the knowledge of plaintiffs' clerk, took from a list in his possession the marks of the goods. This list had been made from counterpart bills of lading in defendant's possession. There was no proof that plaintiffs' clerk believed, or had, from anything said or done by defendants, reason to believe, that the list was of goods that had actually arrived. It may be here said, that plaintiffs' clerk neither saw nor acted on the manifest filed in the custom-house.

The published notice to consignees to take their goods, &c., cannot be justly deemed to have led any particular consignee to believe that his particular

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goods had arrived. While it incited consignees to prompt action, it did not suggest anything that would involve the consignees omitting to find out that goods had arrived before paying duties upon them. It does not appear that the placing goods in public store was so expensive, that to avoid it an owner would pay duties even before he had ascertained that the goods were on board.

It appeared from the testimony that defendant's clerk acted with reference only to the plaintiffs having an unembarrassed opportunity to get their goods whenever they should be prepared to receive them, and with no reference to the payment of duties, and no intention to influence the plaintiff as to that payment. The plaintiffs' clerk did not disclose, nor did the circumstances, that he meant to act upon the delivery order, as evidence of actual arrival, and as making it safe for him to proceed to the payment of duties. He had no reason to believe that the defendant's clerk intended to influence him in that regard. The two things had no necessary or probable connection.

The plaintiffs' clerk was not justified in believing that the other meant to assert that he had any knowledge of an actual arrival. The latter evidently was acting in what he did on a supposition or an inference.

The facts show that the necessary constituents of an estoppel *in pais* that have been specified, did not exist in this case, and that the plaintiff did not have the right to recover the amount of duties, even if the other facts were sufficient.

I am of opinion that the amount of the judgment should be reduced, in the sum of \$878.49, and interest from July 18, 1876, and affirmed as reduced. As the appeal was from the whole of the judgment, neither party should have costs of this appeal, in case such an order is entered. But if the defendants wish a new trial, then the appellant should have costs of the appeal.

VAN VORST, J., concurred.

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HARRIET H. GARNER, ET AL., PLAINTIFF AND
RESPONDENT, v. THE HARMONY MILLS, IM-
PLEADED, &C., DEFENDANTS AND APPELLANTS.

ORDER OVERRULING DEMURRER, APPEALABILITY OF.—INTERLOCUTORY
ORDERS, &C.

The direction or order of the court, overruling the demurrers of the defendants, and that the plaintiff have judgment, &c., unless the defendants within twenty days, &c., pay the costs and serve an answer, is not appealable under section 1347 of the Code of Civil Procedure.

Except in some cases like the present one, an interlocutory judgment, on an issue as to the merits, is a final determination of part of the issue, leaving the rest of the issue to be thereafter adjudged. An order or direction of the court cannot be deemed a judgment of any kind, unless on its face it determines some part of the issue.

In this case the judgment is not pronounced. It is an order that plaintiff have judgment, &c., but the judgment must be entered before defendant is entitled to an appeal.

Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

Appeal by defendant from order overruling demurrer and motion to dismiss appeal.

Messrs. Luther R. Marsh and Homer A. Nelson, for appellants, urged:—I. The appeal is properly taken. The Code confers the right to appeal. An appeal lies from an interlocutory judgment (*Code*, § 1349). This is an interlocutory judgment. The judgment appealed from: (1.) Recites the trial of the issues of law raised by the demurrer. (2.) It then orders and decides that the demurrer of the Harmony Mills be and the same is thereby overruled, with costs to the plaintiffs. (3.) It then proceeds to order and decide that the plaintiffs have judgment against the

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Harmony Mills for the costs herein, and for the relief demanded in the complaint, according to the prayer thereof, unless defendant pays costs, and answers. This surely is a judgment or decree; either final, with a condition or defeasance, or interlocutory. It fixes or defines the rights of the parties, *i. e.*, they are such as are claimed in the complaint. Now, if, on non-service of answer for payment of costs, nothing more need be done by plaintiffs, except for the clerk to put together the papers constituting the judgment roll, then the judgment or decree is final. If anything more is to be done to fix the plaintiff's rights, then it is interlocutory. An interlocutory judgment or decree is an "intermediate" or "between" judgment or decree. This is more than an order; it is a judgment or decree of some kind. If the decision had stopped after ordering that the demurrer be overruled with costs, as in *Miller v. Sheldon* (15 *Hun*, 220), there would be ground for claiming it to be simply an order. The decision expressly gives judgment; that is the word used, and judgment for the relief demanded in complaint. Is it not, then, a judgment? Do plaintiffs now wish to take back their own words, and say, "we didn't mean judgment; we only meant an order"? An interlocutory judgment, on overruling a demurrer, can be granted. This is recognized in *Miller v. Sheldon* (15 *Hun*, 220). This judgment determines everything except the form of the final judgment. If defendant does not pay costs and answer, then, all that remains is for plaintiff to enter the final judgment authorized by this interlocutory judgment (*Hoffman v. Barry*, 2 *Hun*, 52). Both in substance and in form the determination of the court appealed from in this case is a judgment. (1.) In substance. A decision on a trial is defined to be a judgment, as distinguished from a decision on a motion, which is an order (*Bentley v. Jones*, 4 *How. Pr.* 335; *King v. Stafford*, 5 *Id.* 30; *Hoffman*

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v. Barry, 2 *Hun*, 52). This is a decision on a trial of issues of law, which issues were raised by the pleadings. (2.) In form. It settles the rights of the parties—adjudges them. It does not recite, according to the invariable and proper practice, “on reading and filing the affidavits,” &c., but according to the common form of a judgment, it recites, “this action, having been brought to trial on the issues of law raised herein, by the demurrers,” &c. The two cases decided in the fourth district of New York supreme court (*Miller v. Sheldon*, 15 *Hun*, 220, and *Lacustrine F. Co. v. Lake Guano, &c. Co.*, *Daily Register*, Feb. 15, 1879), were appeals from orders simply.

Messrs. Choate and Hugh L. Cole, for respondents, urged:—I. An order of the special term, overruling or sustaining a demurrer, is not appealable (*Lacustrine Fertilizer Co. v. Lake Guano and Shell Fertilizer Co.*, *Daily Reg.*, Feb. 15, 1879. Supreme Court, Fourth Department, General Term, October, 1878; *Miller v. Sheldon*, 15 *Hun*, 220). The Code of Procedure, section 349, specifically authorized an appeal from an order of the special term, from a single judge, to the general term of the same court, sustaining or overruling a demurrer. The Code of Civil Procedure (new Code) has altered all this, and does not authorize an appeal from such an order. Section 1347, which takes the place of section 349 of the old Code, in providing for an appeal to the general term from orders of the special term, does not include the case under consideration; clearly showing the intention of the commissioners to do away with appeals in such cases. The object of the legislature, in enacting the amendment of 1851, to section 349 of the old Code, was to enable a party who was defeated upon the argument of a demurrer, to stay the trial of issues of fact, until the question of law which might render the trial unneces-

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sary should have been finally settled upon an appeal from the decision of the special term on the demurrer. But it is apparent that this object could not be accomplished unless the party who is defeated at the general term, has the right to prosecute his appeal to the court of appeals. "If, therefore, there is any sufficient reason for allowing an appeal to the general term before final judgment, upon the same principle a like appeal should be allowed to the court of appeals" (*Code Civil Procedure, Throop's Ed.* § 1350, *n.*). The defendant's remedy, in a case like the present, is by appeal from the judgment, whether final or interlocutory, entered upon the decision of the issues of law raised by the demurrer. Judgments, both interlocutory and final, are provided for in the new Code, and section 1236 provides that "the clerk must keep among the records of the court a book for the entry of judgments, styled the 'Judgment Book.' Each interlocutory or final judgment must be entered in the judgment book, and attested by the signature of the clerk," &c. . . . In the case at bar no judgment, final or interlocutory, was entered. An order overruling the defendants' demurrer was duly entered. As the Code has made no provision for an appeal from this order, the conclusion is obvious. The case of *Miller v. Sheldon* (*supra*) arises under precisely the same circumstances as the case under consideration. In the case of *Lacustrine Fertilizer Company v. Lake Guano and Shell Fertilizer Company* (*supra*), an appeal from an order of the special term sustaining demurrer to the complaint was dismissed. The new Code defines final and interlocutory judgments, provides the methods of entering both, and distinctly allows and authorizes appeals from each. The "order" sustaining or overruling a demurrer being omitted from the orders appealable, under this new Code, and the reasons given for this omission (*Code Civil Procedure,*

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Throop's Ed. § 1350, *n.*), this present appeal cannot be entertained.

II. We agree with the learned counsel for the defendants that the Code has not substantially altered the rules of equity pleading as to multifariousness, and that the matter rests as in equity before the Code. Reverting, then, to the rules then followed, we say that the whole matter of multifariousness is mainly a matter of discretion in the court, to be applied to the circumstances of each particular case as it transpires (*Story Eq. Pl.* § 530). The leading case in our own courts on the subject (*Brinkerhoff v. Brown*, 6 *Johns. Ch.* 139) will be found most fully to sustain the bill as framed in the present case. And the case of *Fellows v. Fellows* (4 *Cow.* 682), in the court of errors, sets forth similar doctrines upon the demurrer to a bill combining quite as extensive a series of matters, all constituting what the law regards as the same transaction like that at bar. WOODWORTH, J., cites the saying of Lord REDESDALE in *Whaley v. Dawson* (2 *Sch. & Lefr.* 370), with approval. The case of *Getty v. Devlin*, reported in the commission of appeals (54 *N. Y.*), and in court of appeals (69 *Id.*), is also a strong authority in support of the present bill, and many cases cited in the text-books fully sustain the theory of the present action (*Story Eq. Pl.* §§ 285, 285 *a*, 286, 286 *a*, and cases cited; also 278 *a*, and §§ 530–535, 539).

BY THE COURT.—SEDGWICK, J.—It is agreed that, under section 1347 of the Code of Civil Procedure, the direction of the court, unless it is an interlocutory judgment, is not appealable. The words of this order are “it is ordered that the demurrers of the defendants, &c., and of the defendant, the Harmony Mills, be, and the same hereby are overruled,” and “it is further ordered and decided that the plaintiffs have judgment against the several defendants as above specified, for

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costs herein, according to the prayer thereof, unless the several defendants above specified, within twenty days from the entry of this order and notice, pay the costs, &c., and serve their answer." Under any circumstances, the form of this is imperfect. As it stands, the service of an answer would leave a demurrer upon the record undetermined, or an implied determination in defendant's favor. A better form, perhaps, would have been, with leave to the defendants, within, &c., on payment of costs, to withdraw the demurrer and serve an answer.

Except, perhaps in some cases, not like the present one, an interlocutory judgment on an issue as to the merits is a final determination of part of the issue, which leaves the rest of the issue to be thereafter adjudged. It cannot be a judgment of any kind, if on its face it does not determine some part of the issue. Merely overruling a demurrer is essentially removing an obstacle, which the demurring party has interposed, to the other side proceeding to judgment upon the facts. In and of itself, that does not give the other side a judgment. It leaves him at liberty to proceed to judgment. Beyond this, an order asserting that the plaintiff have judgment is not a part of the judgment which he may have. The judgment is yet to come; when it is entered, it adjudges the existence of certain things, for instance, in a case like this, it would determine that a trust existed, that the trustees took the mortgage made by the defendants; that the defendants knew the terms of the trust, and if the court so held, for this is said only as illustration, that the defendants cause to be procured the consent in writing, &c. It would or would not leave some part of the issue undetermined, according to circumstances.

In the present case it is ordered that the plaintiffs have judgment and nothing more. The judgment in whole or in part is not pronounced. Indeed, if it is at

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all a judgment, it is a final judgment, if it were not for the clause "unless," &c. But this clause, unless the defendant serve an answer, goes back of the order that plaintiffs have judgment. If an answer be served, that prevents a judgment being entered. In that case, the order in substance is that the plaintiffs do not enter judgment, but proceed to trial of the issue of fact.

If, however, it should appear that the defendant allowed the twenty days to pass without serving an answer, there would be nothing then but an order overruling the demurrer. Before the defendant is entitled to appeal judgment must be entered, and this judgment will be final or interlocutory, according to its terms, and the contingencies of the facts.

The motion to dismiss appeal is granted, with costs. The order is to be settled upon notice.

VAN VORST, J., concurred.

THADDEUS F. MORE, AS ASSIGNEE IN BANKRUPTCY, &C., PLAINTIFF AND APPELLANT, v. LOUIS DURR, SURVIVOR, &C., DEFENDANT AND RESPONDENT.

SECURITY FOR COSTS.

Section 317 of the Code of Civil Procedure provides "that the court may, in its discretion, in the cases mentioned in this section, require the plaintiff to give security for costs."

Among the cases mentioned in this section is that of a "trustee of an express trust." An assignee in bankruptcy is a trustee of an express trust, within the meaning of this section (*Reade v. Waterhouse*, 52 N. Y. 587).

Held, that the court has power to require the plaintiff to give security for costs, when he is an assignee in bankruptcy.

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Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

Appeal from order requiring plaintiff to file security for costs.

Edward Sexton, for appellant.

S. B. Brownell, for respondent.

BY THE COURT.—SEDGWICK, J.—The appeal is taken from an order that the plaintiff file security for costs, &c. The order does not direct in what form the undertaking should be, and on this appeal it does not appear that an undertaking has been filed. It was, however, orally claimed by the counsel for the respondent that an undertaking had been filed, and that therefore this appeal should be dismissed. But, as no motion to dismiss had been made, and the claim was not presented on affidavit, the court decided not to entertain the motion to dismiss, but to proceed to the merits of the appeal.

If the learned judge had power to grant the order, the facts of the case show no reason why his particular exercise of discretion should be reviewed.

The court of appeals held, in *Reade v. Waterhouse* (52 N. Y. 587), that an assignee in bankruptcy was a trustee of an express trust within the meaning of section 317 of Code of Procedure. At the end of the section is the clause "And the court may, in its discretion, in the cases mentioned in this section, require the plaintiff to give security for costs." When the meaning of a statute is plain, it must be followed without an attempt to construe another meaning into it, or out of it. The meaning is clear if the "cases mentioned" can be ascertained. If that includes, as a case, where a trustee of an express trust is plaintiff, and where, by

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the section, costs shall be recovered, as in an action by a person prosecuting in his own right, the court had discretion to require security. If, however, something more limited was meant by a "case mentioned," it would be when the "costs shall be only chargeable upon or collected of the estate, fund, or party represented." This would be a "case;" and the third "case" would be, "unless the court shall direct the same to be paid by the plaintiff . . . personally, for mismanagement or bad faith in such action," &c. Undoubtedly the section meant that the security should be required before the event of the special provision for costs in the judgment had been reached. It was to be given, in a proper case, before the defendant had yet suffered the expense or burden of meeting the claim. It could only secure this, viz. : that the estate should really pay the costs, or that the plaintiff personally should pay them, if he were charged for his mismanagement or bad faith. I do not see how the section could mean that the power of the court to require security was limited to the single case of mismanagement or bad faith on the part of the plaintiff, to be shown before the security would be required.

I am of opinion that if "by cases mentioned" the section did not intend actions by executors, administrators, trustees of an express trust or a person expressly authorized by statute, as a matter of formal interpretation, it substantially meant so by classifying such actions in the subdivision, (1) when the costs are chargeable against the fund, (2) when they are to be paid by the plaintiff personally.

The only doubt as to this may be that an assignee in bankruptcy, no matter how valuable the assets, has no "estate or fund" under the power of a State court. Be this so; then an action brought by an assignee in bankruptcy is a case by itself mentioned in the section, and if the section intended that security should be re-

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quired when there was an estate or fund on which a State court could charge costs, its intention applied more strongly to a case where there was no such fund.

I am of opinion that the order should be affirmed, with costs.

VAN VORST, J., concurred.

PETER MARIE, ET AL., PLAINTIFFS AND RESPONDENTS, v. CORNELIUS K. GARRISON, ET AL., DEFENDANTS AND APPELLANTS.

DEMURRER TO COMPLAINT.—TENDER.

It was necessary to allege a breach by defendant of the contract set forth in the complaint.

The complaint alleges no more than "that although often requested so to do, the said Garrison *has refused and does refuse to fulfill his said contract and agreement with the plaintiff*, and to issue or cause to be issued and delivered to the plaintiffs thirty-six thousand shares of stock in said company, in exchange for the stock of the Pacific Railroad, so as aforesaid held by the plaintiffs." This allegation does not allege a fact so much as an opinion of the pleader, that something said or done, but which is not stated, was a refusal to comply with defendants' part of the contract.

The omission to state *when and where the request was made* may be deemed as only indefinite and uncertain, but the omission to state *by whom the request was made* is substantial, and the demurrer is well taken.

But in this case there was stock to be delivered by the plaintiff, and until the plaintiff, being ready, tendered *in presenti* their stock, the defendant was not bound by the contract to deliver his. The pleading must allege the tender, or must show something sufficient as an excuse for not tendering (*Lester v. Jewett*, 11 N. Y. 463).

An absolute refusal of the party on one side to perform and fulfill a contract is a sufficient excuse to the other side for not making

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a tender, when a tender is necessary; but the complaint must allege and show the fact, *that there was such a refusal*, and that the omission to tender was occasioned thereby.

In case of refusal that excuses a tender, still there can be no recovery unless it appears by the pleading that the party so excused was ready and able to tender.

Held, that this complaint was demurrable for these reasons.

Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

Appeal by defendants from order overruling demurrer to complaint.

Messrs. W. B. Putney, M. C. Day, Henry L. Clinton and George F. Comstock, for appellants.

Messrs. Tremain & Tyler and W. A. Beach, for respondents.

BY THE COURT.—SEDGWICK, J.—It was necessary to allege a breach, by defendant, of the contract which it is said he made. Of this, the complaint says no more than “that although often requested so to do, the said Garrison has refused and does refuse to fulfill his said contract and agreement with the plaintiffs, and to issue, or cause to be issued, and delivered to the plaintiffs, thirty-six thousand shares of stock in said company, in exchange for the stock of the Pacific Railroad so as aforesaid held by the plaintiffs.” The allegation “refuses to fulfill his said contract” does not allege a fact, so much as an opinion of the pleader, that something said or done, but not stated, was a refusal to comply with the defendant’s part of the agreement. The fact stated is that the defendant refused to issue, or cause to be issued, the stock. If a refusal, after request alone, with nothing more, was a breach, it is doubtful that the pleading states the

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request properly (1 *Chitty's Pl.* 331). It may be only indefiniteness or uncertainty, in so far as it does not state where and when the request was made, but probably its omission to state by whom is substantial.

But it does not appear that a refusal to issue stock, upon a request, is a breach of the contract. He agreed that "he would deliver to the plaintiffs and said Denny, in return for the amount of the stock of the Pacific Railroad, so as aforesaid held by them, thirty-six thousand full paid shares." He was to deliver, only, as and when the plaintiffs returned their stock. The duties respectively were of equal standing. Unless and until the plaintiffs, being ready, tendered *in presenti* their stock, the defendant was not bound by the contract to deliver his. Therefore plaintiffs must plead that they tendered, which clearly they have not pleaded, or must show something sufficient as an excuse for not tendering. With many other cases, *Lester v. Jewitt* (11 *N. Y.* 463), is clear as to this.

It is, however, argued that a sufficient excuse for not tendering is alleged, on the rule, that an absolute refusal of one side to perform is an excuse to the other side from tendering. Of course, there is a general rule, that a refusal, which as matter of fact waives the tender on the other side, or leads it to omit to tender, or which, as against the party refusing, shows that he would not accept the tender, is an excuse for not tendering. Then the complaint must show, as the fact, that the omission to tender was occasioned by the refusal, which is almost the reverse of the complaint, alleging that after a request, without more, the defendant refused. Then the question is, was not the defendant justified in his refusal, by the omission to tender. Should there be a refusal of a kind that excused from a tender, there could not be a recovery, unless it appeared that the party who was excused was ready and able to tender.

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A mere refusal to perform is not *per se* an excuse. A refusal may not be a breach, for the construction of the contract may uphold the refusal. This complaint shows such a case, for its true meaning is that the defendant oftentimes refused to issue the stock, although the plaintiff, without tendering or being able to tender, asked him to do so.

There lurks the semblance of a doubt as to the correctness of this, in the words, in exchange for plaintiff's stock; that is, "he refused to deliver the thirty-six thousand shares, in exchange for the stock of Pacific Railroad, held as aforesaid by the plaintiffs." This gives rise to no real doubt, for these words cause only an obscurity of the true construction of the complaint. The defendant's refusal to exchange for plaintiffs' stock was justified when, without a tender, he was only requested to exchange for plaintiffs' stock. The request was only a demand, not necessarily—and here, so far as the complaint goes, not, in fact—accompanied with a tender. In fine, the complaint has no allegation of the essential fact, that the plaintiffs were ready and able to tender and did tender performance on their part, nor of any excuse for not tendering.

This point requires a reversal of the order overruling the demurrer. As leave will be given to the plaintiff to amend on terms, it is not necessary to discuss all the other objections to the complaint. These objections are serious, and call for a restatement of the matters to which they apply. At least, they suggest the expediency of amendment. I refer now to the allegations as to the consideration, and as to the terms of the contract.

There are some objections which should receive specific attention on this appeal. One was that it did not appear that the plaintiffs have legal capacity to sue, as there is no averment "showing whether plaintiffs sue in their own right or in trust for others, and no

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authority is shown for suing in trust for others, and no specific interest in the matters complained of is shown to exist in the plaintiff or any of them," &c. Another is, that there is a misjoinder of parties plaintiff, inasmuch as it does not appear from said complaint that the plaintiffs have any joint cause of action.

The complaint does not show that the plaintiffs lack capacity to sue for any right that the complaint may allege to exist in their favor. In the first part of the complaint it is averred that before the making of the contract pleaded, they, plaintiffs, owned and held, either in their own right or in trust for others, with full power of disposition, as hereinafter related, "thirty-six thousand shares of the capital stock of the Pacific Railroad of Missouri," &c. It is seen that if it were necessary for the plaintiffs to show the fact of their title or power of disposition, as part of their cause of action, it would be impossible to say from the allegations whether the plaintiffs sued in their own behalf as owners, or in behalf of beneficiaries for whom they were trustees. The interest, however, which they assert is not such as depends upon the title of the stock. They claim an interest in a contract alleged to have been made in reference to the stock. That contract was made with them jointly, as the complaint states that said defendant "promised to and agreed with the plaintiffs." They agreed, as any one not owning at present property might, to exchange it in the future, and the property which they agree to exchange is described as stock, which they owned or held in trust, and over which they had full power of disposition. Their right to recover is placed upon the stock they are to return being one or the other, wholly or partly. As against the defendant, who made the contract, the plaintiffs, on the face of the complaint, are interested in their own right. Their respective interests in the stock to be issued or their obligations to others, does not, on this

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complaint, change the nature of their joint legal interest in the contract. Whether the facts would sustain the pleading is not a question on the demurrer.

There were certain objections made to the complaint, based upon the proposition that the contract on its face was void, for a fraudulent intent to other stockholders, or because its legal operation was to prevent the plaintiffs' bidding at the sale in foreclosure. These were not fully discussed by the respondents, for the reason, as I suppose, that in the court below the complaint was not attacked on these grounds. The best course will be, to argue these points again, if it becomes necessary after an amendment of the complaint.

It is best to say, that on this appeal the plaintiff did not object that the order was not appealable. The fact that the merits are heard must not be a precedent for appeals from orders overruling demurrers.

Order overruling the demurrer is reversed and judgment ordered for defendant, with costs, with leave to plaintiff to amend on terms to be settled.

VAN VORST, J., concurred.

ANDREW KOCH v. MARGARET PURCELL.

I. REFEREE'S REPORT.

1. Varying by affidavits not allowed.

(a) REPORT OF SALE.

To sustain a report of sale as against exceptions filed to it, affidavits showing that the terms of sale were different from those reported are inadmissible.

II. ONE NOT A PARTY TO ACTION.

1. Standing in court, when.

Assignee of mortgage made after *lis pendens* filed for the foreclosure of a prior mortgage, has when.

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(a) SUCH ASSIGNEE CAN COME INTO COURT TO ASSERT A RIGHT TO THE SURPLUS.

1. E. G. To move that referee pay into court a surplus, shown by the judgment and report of sale to exist, although he reports a deficiency.

III. REFEREE TO SELL.

1. Mortgage cases.

(a) PAYMENT BY, OF SURPLUS SHOWN BY THE JUDGMENT, AND HIS REPORT OF SALE COMPELLED, ALTHOUGH HE REPORTS A DEFICIENCY.

1. Where the report of sale shows that the deficiency was caused by the allowance of a prior mortgage which was not authorized by the judgment (the report not showing that by the terms of sale such allowance was to be made), and that but for such allowance there would be a surplus, the surplus thus ascertained will be ordered to be paid into court.

QUERY. Whether a referee, without being thereunto authorized by the judgment, can, by making it a part of the terms of sale that a prior mortgage will be deducted from the purchase-money, entitle himself to be credited with the amount of the deduction.

IV. APPEAL.

1. Correct decision below—power of general term in respect to.

(a) AFFIRMANCE ABSOLUTE DOES NOT ALWAYS FOLLOW.

1. Where the form in which the matter is presented in the court below, and on the appeal, is such that, although the order below made in such form is correct, yet it does present a question of vital importance to the appellant, and an absolute affirmance would bar the presentation of such question, the general term has power to make an order *giving leave to the appellant to apply to the court below for leave to present the matter in such shape as to raise such question, and ordering that in case no such application is made to the court below, or if made, then in case it is denied, the order appealed from be affirmed; and further ordering that in case the application be made and granted, then, that the order appealed from abide the decision to be made de novo in the proceedings then to be taken.*

Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

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Appeal by the referee appointed to sell in a foreclosure suit, from an order, made on the application of one who, though not a party to the action, yet is the owner of a mortgage made subsequent to the filing of notice of *lis pendens*, compelling him to pay surplus moneys into court, and sustaining exceptions to the report of sale.

This action was to foreclose a mortgage for \$5,000, upon land. The owner, a party defendant, after the filing of the notice of *lis pendens*, made a mortgage, which was afterwards assigned to Johanna Lewniski, who was the person for whom the motion for the order appealed from was made.

By the judgment, the referee was directed to sell the premises, and out of the proceeds to deduct certain things. He was not authorized to deduct from the proceeds the amount of any prior mortgage. He sold, and reported, that he had sold the premises to the plaintiff for \$8,000, that he had allowed the plaintiff, the purchaser, for a first mortgage on the premises, \$6,290.50, and after deducting certain amounts directed by the judgment, that there was a deficiency of \$4,689.

Upon this report being filed, Lewniski, the moving party below, not being a party to the action, filed and served exceptions to the report, and gave notice bringing on the exceptions for hearing, and that at same time, &c., a motion "will be made that the report of the referee, in the particulars excepted to, be set aside, and said referee be directed to pay into court the sum of \$1,400, and interest."

On the hearing the exceptions to the report, it was argued that the referee had no power to pay out of the proceeds the amount of the prior mortgage, and that the amount he did pay for that, should have been applied to the mortgage in action, and that there would be left, instead of a deficiency, a surplus of more than

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\$1,400. In opposition to the motion, affidavits were read in substance that before the bidding it was announced by the referee that there was a prior mortgage, and the amount of it would be allowed to the purchaser out of his bid. These affidavits are more fully stated in the opinion. It also appeared that there was a prior mortgage, on which was due the amount deducted. The court sustained the exceptions, confirming the report as to matters not covered by the exceptions. It was ordered, among other things, that "that part of the report of sale of said referee, in which he credited himself with the sum of \$6,290.50, allowed to the plaintiff on account of the alleged first mortgage on the premises described in the complaint, be, and the same hereby is set aside and vacated, and said credit is disallowed . . . that part of the report . . . which states that there is a deficiency of \$4,689.92 is hereby vacated and set aside . . . it is furthermore ordered and adjudicated that there is now in the hands of the said referee, for the purposes of sale, a surplus, over and above the claim of the plaintiff . . . of \$1,400.33 . . . and the said referee is hereby ordered and directed to pay into this court, to the chamberlain of the city of New York, to the credit of this action, the sum of, &c. . . subject to the further order of this court."

Ambrose Monell, attorney, and of counsel, for appellant, urged :—I. The applicant has no standing in court, *first*, because she is not a party to the action, and, *second*, because she has not shown that she was damaged by the course pursued by the referee. 1. The total amount due on the first and second mortgages at the time of sale was about \$11,600, which, together with \$666 unpaid taxes, made an incumbrance upon the property of \$12,266, which had to be paid before the lien of the third mortgage became of any

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value. 2. The proof is uncontradicted that these two mortgages were actual *bona fide* liens, and also that the value of the property sold did not exceed \$8,000, which was the sum bid. It follows then that the premises not being worth as much as the amount due on the mortgages, the lien of the third mortgage was of no value, and so remains (*Root v. Wheeler*, 12 *Abb. Pr.* 294).

II. The referee did not err in allowing to the purchaser the amount due on the first mortgage. 1. Assuming that no mention was made at the time of sale, of the existence of the first mortgage, and that the premises had sold for \$8,000, the purchaser would have been entitled to a conveyance free and clear of all incumbrances, or else to have been relieved of his purchase. Suppose plaintiff did not know of the existence of this first mortgage, and the premises had been sold for \$8,000, upon ascertaining this fact, would not the referee have had to discharge this lien before he could have enforced the purchase? (a) This first mortgage was a prior lien to that of the mortgage in suit. The rights of the first mortgagee could not be foreclosed in this action, and he was entitled to be paid before any other liens. Hence, practically, it made no difference whether the premises were sold subject to this mortgage or whether the amount of it was allowed to a purchaser out of his bid. 2. The case of *Bache v. Doscher* (67 *N. Y.* 429), is claimed to be decisive on this question, and as warranting the granting of the order appealed from. That case differs from this. In that case there was nothing before the court but the report of sale. It did not even appear that the referee, in terms, sold the land free of the prior mortgages, or that it was one of the terms of the sale that the purchaser was to assume any prior mortgages. And it did not appear who held the mortgages, nor how much was due upon them, nor even that there were any

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prior mortgages, or that the plaintiff paid them. All these facts are supplied by the proofs submitted by the referee, and hence we bring ourselves directly within the line laid down by the court of appeals to entitle the plaintiff to recover.

Barrett & Patterson, attorneys, and of counsel, for respondent, on the points determined and suggested by the court, urged:—I. The referee for the purposes of sale had no right to allow to the purchaser the \$6,290.50. or any sum, for prior mortgage. He was a ministerial officer, bound to follow the commands of the judgment (*People ex rel. Day v. Bergen*, 53 *N. Y.* 404). The referee was plainly prohibited from applying any portion of the proceeds of sale in any other manner. In *Bache v. Doscher* (67 *N. Y.* 429), precisely this question was before the court of appeals upon the same facts, and it was held that the referee had no right to make any such allowances for prior mortgages. It is apparent, therefore, that the referee disregarded his duty in allowing the sum of \$6,290.50, to the purchaser.

II. The referee is not assisted by the fact (if such be the fact) that he agreed upon the sale to allow the sum of \$6,000 and interest out of the purchase-money. He could not vary the judgment in prescribing the terms of sale, nor relieve himself thereby from the performance of the duties enjoined upon him (53 *N. Y.* 404). His duty was to sell the mortgaged premises subject to prior mortgages, if any. He could only sell such title as the parties to the action had (67 *N. Y.* 432; 2 *Rev. Stat.* 192, § 158, marg. paging). The referee had no authority even to announce upon the sale that the premises were subject to a prior mortgage for \$6,000, and that the title conveyed would be subject to such mortgage, because no such fact had been determined against the defendants. His duty was to make the

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simple announcement that the sale would be subject to prior mortgages, if any. If the plaintiff desired to have the sale made subject to the first mortgage for \$6,000, and interest, he should have made the prior mortgagee a party. The court could then determine the interest of such mortgagee, the amount of the lien, &c., and would decree the sale to be made subject to such lien, stating its amount (*Weston Ins. Co. v. Eagle Fire Co.*, 1 *Paige*, 284). Or the prior mortgagee could be made a defendant, and the sale could be made free of the lien of such prior mortgage—the proceeds of sale being applied to its payment as far as necessary (*Haines v. Beach*, 3 *Johns.* 459; *Vanderkemp v. Shelton*, 11 *Paige*, 28). In either case the defendants would have an opportunity of contesting the existence, validity and amount of such prior lien. Without such opportunity the land of defendants could not be applied either directly or indirectly to the satisfaction of such alleged prior mortgage. The defendants are thus cut off from any defense they may have to this alleged lien. The mortgage may be a forgery, or it may be void for usury, or there may be nothing due upon it; but defendants have had no opportunity for a hearing on those points.

III. A conveyance of the land in pursuance of the judgments would vest the title, subject to the rights of prior incumbrancers. Not being parties to the action their rights against the land would not be affected by the conveyance. But as between the purchaser at this sale and Margaret Purcell, the primary obligation to pay this alleged \$6,000 mortgage rested on Mrs. Purcell, and if the purchaser was obliged to pay it to relieve his land he would be entitled to recover from Mrs. Purcell the amount paid. For the purpose of determining the equities between the purchaser of the land and Margaret Purcell, the mortgage in suit is to be regarded as an alienation of the land *pro tanto* at its

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date (*Kellogg v. Brand*, 11 *Paige*, 60 ; *La Farge Ins. Co. v. Bell*, 22 *Barb.* 67). The purchaser at the foreclosure sale acquires the title which the mortgagor had at the date of the mortgage (*De Haven v. Landell*, 31 *Penn.* 120 ; *White v. Evans*, 47 *Barb.* 186). In addition, he acquires all the rights of the mortgagee given by the mortgage in respect to the land (*Hart v. Wandle*, 50 *N. Y.* 381). It would be different if the judgment expressly directed the sale to be subject to the first mortgage and the deed conveyed expressly subject to such mortgage ; that would be a dedication of the land in the first instance to the incumbrance, and would render it primarily liable. This was the distinction upon which *Hart v. Wandle* (50 *N. Y.* 381) turned. If the deed recite nothing as to a prior incumbrance, the land will be subject to the right of the prior incumbrancer. But the land will not be the primary fund for its payment. If the deed expressly recite that the sale is subject to prior incumbrances, then the land is primarily liable for their payment ; but the deed in a foreclosure sale could not contain this clause except in pursuance of a direction contained in the judgment, and such judgment would make proper provision for the protection of the rights of subsequent incumbrancers against *Mrs. Purcell* (50 *N. Y.* 381).

IV. The referee was properly directed to bring into court the surplus which would have been realized had he done his duty. The referee is a trustee of the title of the land for the parties to the cause ; if he parts with the title without receiving the purchase money, he is clearly responsible for the amount of it. In this regard the order of the special term simply carried to its logical conclusion the principle decided in *Bache v. Doscher* (67 *N. Y.* 429).

V. Upon the settlement of the order before the judge at special term, counsel for the referee sug-

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gested that a re-sale would help the referee out of his difficulty. No motion for a re-sale was made upon the hearing of our exceptions, and it was never suggested until after the decision of the special term. The respondent objected to any re-sale, and Judge SPEIR declined to grant it. As a re-sale may be urged here we make this point in opposition to it. (1.) No motion for a re-sale was made upon the hearing of this motion at special term. The affidavits on the part of the referee were introduced in opposition to our relief upon the exceptions, we had therefore no notice of the contents of those affidavits, and no opportunity to answer them. If any suggestion of a re-sale had been made on the hearing of the exceptions, we might have obtained leave of the special term to file affidavits in opposition (a discretionary matter on that hearing). As no such suggestion was made on that hearing, the general term on this appeal cannot in justice make any such order. The referee chose to attempt to justify his conduct, and he should be held to that course upon this appeal. Affirmative relief cannot be granted to a party opposing a motion, upon matter appearing in his papers, which the other party has had no opportunity to answer (*Garcie v. Sheldon*, 3 *Barb.* 232). (2.) A re-sale is only ordered in case of surprise, fraud, or well-grounded misapprehension or mistake (30 *N. Y.* 80; 1 *Abb. N. S.* 424; 62 *Barb.* 280; 25 *How.* 403). In addition, the party desiring such a re-sale must move promptly, and if any damage arise to any party by his delay, it is clear that the re-sale ought not to be granted. There was no well-grounded mistake here; the law and the facts were plain to the comprehension of any person. But the inexcusable neglect and delay of the referee, and the consequent damage to the parties to the cause, is a complete answer to the motion for a re-sale. The report of sale was not filed till May 6, 1878, nearly three years after the sale. The referee says it was

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given to the plaintiff's attorney to file about the time of the sale, but the referee was not directed to report to the plaintiff's attorney, but to the court. He should have filed the report himself; by giving it to the plaintiff's attorney he made such attorney his agent for that purpose, and he is responsible for the neglect. The respondent's attorneys requested the referee to file his report February 2, but no notice of that filing was served upon them till July 18, 1878. On February 2, 1878, the referee was informed of our mortgage, and on July 24, 1878, our exceptions apprised him fully of our claim, yet he never suggests a re-sale till December 19, 1878—more than three years after the sale. Since the sale, property in New York city has depreciated fully one-third. The resumption of specie payments has reduced all values. If a re-sale had been suggested on the hearing below *non constat*, but that we might have shown that Margaret Purcell, who was primarily bound for the alleged \$6,000 mortgage, was solvent in September, 1875, and had become insolvent since; this would prevent any re-sale. No case can be found where a re-sale was ordered to relieve the officer from the result of his own negligence, to the prejudice and against the objection of the injured party.

BY THE COURT.—SEDGWICK, J.—I think there is no doubt that the directions of the court, which concerned matters stated in the report of sale, must rest upon the report itself, and that the report could not be sustained against exceptions by affidavits, which tend to show that the referee made the sale on other terms than the report specified. In a proper case, the court would allow the referee to make and file another report, if an application for that were made. No such application was made in this case. It was clear from the report that the referee had made a payment out of the purchase-money, to protect the purchaser against

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the first mortgage, when the judgment had not allowed him to make it. If this payment had not been made, and the purchase-money had been applied according to the judgment, there would have been the surplus that the learned judge below found did really exist.

If there be any question as to the form of the proceeding to redress the departure from the judgment, it was not made on this appeal, and there was no suggestion of a more proper form than the one used. The claims made by the counsel for the appellant were, that on the case shown by the affidavit the referee was not liable for the amount of surplus which the report showed, after correcting the irregularities that appeared on its face, and that the person making the motion below had no standing in court, because she was not a party to the action. On the report, apart from the affidavits, which cannot be heard against it, I think there was a liability of the referee to the amount of the surplus. Although the applicant was not a party, it appeared that she had become an assignee of a mortgage made *pendente lite* by the owner of the equity of redemption. To the extent of the mortgage she had the same right to the surplus that the owner would have had. To assert this right, it was not necessary, as I understand the practice, for her to be made a party. In fine, on these points I am of opinion that the order below was right, and should be affirmed. And a strict regard to the disposition of the case, as the parties have chosen to shape it, would leave the matter here. Strictness, in particular instances of this kind, leads to a better administration of justice in the aggregate. It is the strongest incentive to an exact and thorough exposition of the rights of parties in other cases, in the first instance, and hence to prompt justice in a sound form. But it is, sometimes, the practice to look after the equity of the case on appeal, if justice demands it, even where it has not been pre-

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sented in due form to the court below. I think the affidavits, read for the referee, disclosed facts which would have suggested to the court a modification of the order, if it had been requested, and would not have weakened the sound rule stated by the court in the opinion.

The affidavit of the referee showed that immediately before the sale it was "publicly announced to the persons present at said sale, that there was upon said premises a mortgage, upon which there was due the sum of \$6,500 and interest, and which was a prior lien to the mortgage under which the premises were then being sold," which would be allowed to the purchaser out of his bid; and that "said premises were then and there fairly struck off to the plaintiff for the sum of \$8,000, he being the highest bidder, and that being the highest sum bidden for the same." The affidavit of the auctioneer is to the same effect. The plaintiff and his attorney make like statements severally by affidavit. These say the matter orally announced was in or noted on the terms of sale, although these terms were not presented on the motion, the recollection of plaintiff's attorney being "that only one copy was made out, and that was left with the referee;" the probability of the announcement being made is confirmed by the situation and value of the property and the liens upon it. There was no testimony to the contrary.

I find that these facts are singularly like those in *Hotchkiss v. Clifton Air Cure* (4 *Keyes*, 170), which, as it was not cited to us on the argument, I believe was not to the judge who heard this motion.

The action in the case cited was for the foreclosure of a mortgage. Prior to this mortgage was another for \$2,500, with interest. The prior mortgagee was not a party, nor did the pleading or judgment refer to his mortgage. On the day of sale, the property was put

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up for sale, subject to the prior mortgage, and the person who afterwards purchased bid \$16,000. Then the plaintiff's attorney said to the referee that the judgment permitted the land to be sold free and clear of the prior mortgage, and the referee thereupon announced to the bidders that he would pay off the prior mortgage and give a clear title. The property was then sold for \$20,000. The referee executed a deed of the premises free from incumbrance, and the purchaser paid him the amount bid, less \$2,562, the amount of the prior mortgage. Parties in interest then moved that the purchaser complete his purchase by paying the sum that had been deducted. The special term granted the motion that the purchaser pay the additional sum; but the general term reversed it.

In the court of appeals, the counsel urged that the referee had no power under the judgment to sell the property in the way he did, or to make the deduction, and that the purchaser had constructive notice of the judgment; that the prior mortgagee was not a party, and its existence or amount had not been determined as to the parties to the action; that under any circumstances the whole amount should have been paid to the referee, so that he might pay over the amount of the first mortgage and present the receipt for it with his report. Judge HUNT, after saying that it was possible that the referee erred in undertaking upon the sale to provide for the payment of the first mortgage, continued (p. 178): "Assuming the law to be as claimed by the appellants, the relief asked for is a *non-sequitur*. If the sale was irregular or unauthorized, it by no means follows that the purchasers should be compelled to pay \$2,500 more than they bid for the premises. On the contrary, the plain remedy would be to vacate the sale, and again to offer the premises for sale. This the appellants do not ask, and apparently do not desire. While they insist that the sale was irregular, they also

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insist upon its confirmation. While they say that the referee had no right to sell upon the promise of giving a clear title, they still insist that the purchasers shall be held to their purchase, and shall pay \$2,500 more than they undertook to pay when they bid on the property. This claim is in violation of every sound principle. The purchasers never made the contract which the appellants seek to impose upon them. They have fully performed the bargain they did make." Judge CLERKE said: "This may be deemed an application seeking the equitable interposition of the court. The application is that the purchasers should be compelled to complete their purchase. The answer is that they have already done so. The referee expressly told them, at the time of the sale, that at the suggestion of the plaintiffs' attorney in the foreclosure suit he would pay off the prior mortgage, and give a clear title. The premises were then sold under that announcement for \$20,000, and thereupon such an arrangement was made that the referee executed and delivered a deed, and the purchasers paid him \$20,000, less \$2,562, which was the amount of the prior mortgage on the day of sale, and which, unless since paid by the purchasers, is still an incumbrance on the premises. The effect of granting this application would be to compel the purchasers to pay \$2,562 more than they contracted to pay. This would be inequitable."

I do not mean to decide that these propositions are to be applied, as the case stands at present. As against the applicant, there was no case before the court on which there could be a hearing, irrespective of the face of the report. When the case is presented, the court may have an opportunity to pass upon the obligations of the referee. I think, however, that before the present order is carried into effect, or rather, before it is to be held or be deemed a final adjudication, the referee should have an opportunity to present to the

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court below, an application for leave to file a new and correct report, and for the decision of the court to be stayed upon the principal motion until such new report be filed and exceptions thereto made and argued. Of course, such application will not be granted, unless it is properly made and supported. In case such application is denied, the present order appealed from is affirmed, with costs. If it be granted, the present order is to abide the decision to be made *de novo*, in the proceedings then to be taken. The costs of this present appeal, and disbursements to be taxed, are to be paid, in any event, by the referee.

VAN VORST, J., concurred.

ALBERT G. WOODRUFF, AND OTHERS, PLAINTIFFS
AND APPELLANTS, v. JOHN R. TERRY, DEFEND-
ANT AND RESPONDENT.

I. BANKRUPTCY PROCEEDINGS.

1. Composition meetings of creditors.

(a) *General meeting of creditors, for the purpose of varying the original resolution of composition, and of allowing the debtor to correct his original statement of creditors, by including other parties.*

1. POWER OF MEETING, as to consenting to the addition of others to the original list of creditors, and binding those so added by a resolution extending the term named in the first resolution for the payment of the composition amounts thereby fixed.

1. It has such power, subject to the approval of the bankrupt court.

2. *Bankrupt court.*

(a) JURISDICTION OF, AS TO COMPOSITION RESOLUTIONS.

1. As to both *original and additional resolutions*, it is vested with jurisdiction upon a certain notice to creditors to inquire and determine whether such resolutions have been passed in the manner directed by law.

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1. ATTACKING JURISDICTION COLLATERALLY.

1. It cannot be attacked by evidence showing that the creditors who passed the second resolution were not creditors, because they had received the composition given by the first resolution ; nor by evidence that there was no time to be extended (the resolution being one of extension), because all the composition amounts had already been paid, nor by evidence that an omission to place in the list of creditors certain creditors (the resolution being one of correction in this respect), was not a mistake inadvertently made ; because all these matters must be regarded as having been passed on judicially by the bankrupt court, when it ordered the resolutions to be recorded.

(b) NOTICE, JURISDICTION DEPENDING ON.

1. If the proper notice is given, jurisdiction is gained, *although the party fails to appear.*

1. CONDITIONS IMPOSED ON APPEARANCE.

The imposing by the register, as a condition of being allowed to appear, that the party should prove his claim, *does not destroy the jurisdiction gained by the service of notice.*

3. *Debts bound by composition.*

- (a) One which became *due after* a resolution of composition, *but before* a resolution extending the time to pay the composition amounts specified in the first resolution, and *correcting the first list of creditors, by adding the name of the party holding the claim, such party having due notice of the second meeting, IS BOUND.*

Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

Appeal from judgment for defendant, on verdict directed by the court.

The action was against the defendant, as indorser of two promissory notes. The first of these notes fell due January 15, 1877, and the second, April 15, 1877.

The defense was, that these debts had been discharged by the effect of a composition made under the bankruptcy act of the United States, in a proceeding in which the defendant had been adjudged a bankrupt.

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The testimony showed that composition proceedings were begun under section 17 of bankruptcy act of June 22, 1874, which ended in the district court in bankruptcy ordering the resolution to be filed, and the statement of debts and assets to be filed. The plaintiffs' names as creditors had been omitted. All the other creditors received the amounts provided by the resolution to be paid to them. After this, steps were taken by which a general meeting of creditors was held, for the purpose of varying and adding to the original resolution, by extending the time for the payment of the amounts, and also to allow the debtor to correct his first statement by including the names of plaintiffs. This was corrected, and the resolution was varied. Thereupon the district court ordered the additional resolution to be recorded, and the corrected statement to be filed.

The court upon this proof directed a verdict for the defendant.

John Brooks Leavitt, of counsel for appellants, on the points considered by the court, urged, among other things:—I. (1.) There being confessedly no jurisdiction over us at the outset, none could be afterwards obtained, because the section points out only a single way in which it could be got, viz., upon a notice of the first meeting "to each known creditor, of the time, place and purpose of such meeting, such notice to be personal or otherwise, as the court may direct." This must then be followed up by the placing of the creditor's name on the statement presented at such meeting. These must both concur. The creditor is, in theory, brought into court by serving the notice by mail or otherwise—whether he receives it is immaterial; if sent, the court has obtained a provisional jurisdiction, which it loses if the name is left off the statement. The proceeding may well be likened to our State court

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obtaining a provisional jurisdiction, by the granting of a provisional remedy, which jurisdiction is finally ripened by the service of the summons. The analogy is an apt one, for, suppose a judgment entered, showing no service of summons, would such judgment have any force? In the present case, neither notice was sent, nor were we named. Jurisdiction was not obtained over us, and the section provides no other process or way that it may be obtained. (2.) To this it will be answered—the only answer that can be made—the section does provide, there is a clause which gives the court jurisdiction in just such a case, viz., that any mistake in the statement may be corrected. To this we submit: (a) The clause was not intended to apply to such a case. (b) Even if it were, it has never been acted on in such a way as to give the court jurisdiction to enter its final order of August 16, so as to bind us. (a) It does not apply. This is not a mistake, it is an omission, a word of wholly different derivation and import. Congress has used both words, and provides for each case. For a mistake it provides relief. For an omission it adjudges a penalty. Here, the mistake of not naming a creditor is specially before comprehended and provided for by itself, so that the subsequent general provision as to the class is not to be stretched to this. Again, there is no provision by which jurisdiction can be obtained over us by the service of a notice for the second meeting. 1. What we did under that notice does not constitute an appearance which will give jurisdiction. It may be said that because these plaintiffs appeared before the register, and again before the court, that for that reason they are bound. The register answers this, he ruled that they were not in court till they proved their claim in the composition proceedings. The practice in the United States courts is to require creditors to prove their debts in the composition proceedings, whether

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they have proved them in the bankruptcy or not. Until they do so prove in composition they cannot vote, or take part in any way (*Blumenstiel Bankruptcy*, 412; *In re Keller*, 18 *N. B. R.* 332; *In re Mathews*, 17 *Id.* 225; *In re Scott*, 15 *Id.* 73). This they did not do. They refused to do that which would have waived their rights. So again before the court. Having no standing before the court, they had no right to appear, and the permission of the court to allow their counsel to talk could not give it jurisdiction over them. A court must obtain jurisdiction by the service of some process, authorized by some law, or such an appearance by the party as waives the service of process. In this case, plaintiffs' first knowledge of the composition proceedings was the notice served on them. Whether that was proper process is the very point for this court to decide. When they went to the register's office to find out what it meant, the register himself ruled that they were not before him, unless they acknowledged his jurisdiction by proving their claim; and *non constat* but that Mr. Justice BLATCHFORD held the same way. Now, while we concede that where a court has jurisdiction over the subject matter, and obtains it over the person, many mistakes which may thereafter happen, pending the administering its relief, may be corrected; yet we dare to affirm, that it has never yet been held, that the correcting of a mistake can give jurisdiction, for the vital reason that there is no jurisdiction to correct. If an attachment is fatally defective, a judgment upon it is equally so, nor can it be made valid by the amendment of the attachment, because the latter must uphold the former. A summons which is void cannot afford jurisdiction to the court *ex parte* to correct it. Atlas may uphold the world, the world cannot uphold Atlas. The case of *Thurber v. Blanck* (50 *N. Y.* 80), is an instance of this reasoning. (b) Even if this clause does apply, it has never in fact been applied. There

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has never been any meeting of creditors, at which this so-called mistake was corrected. Why? There were no creditors. They had all been paid. They were creditors no longer. Again, it is said that the additional resolution must be passed in the same way as the original one (*In re Remsen*, 11 *N. B. R.* 21; *In re Asten*, 14 *Id.* 7). Now, a resolution, until formally ordered to be recorded, has no validity. Therefore, it cannot be pretended that we were parties to this proceeding until August 16, the date when this additional resolution was ordered on file. But that was the last order in the premises. On that day, be it conceded, we became parties thereto. The bankrupt should then have called a meeting of creditors to consider his proposition. If they wanted to pass upon it, they must have refunded, and then the proceedings be gone all over again *de novo*. For we were not bound till we were made parties, and when we were made, we had all the rights which the statute gives to those who are parties. Being brought in by amendment, the case would have to be tried over again as to us. It never has been. Will this court determine that the trial binds us *ex post facto*? Lastly, conceding everything that defendant may claim as to the clause about a mistake applying to such a case as this, yet, where a composition has been passed, and the payment as therein provided made, and the time within which it was to be made has elapsed, so that the whole thing is out of court, it is then too late to allow the amendment. The court has no longer, even if it had up to then, the power to grant the relief. Mr. Justice BLATCHFORD, in *In re Hinsdale* (16 *N. B. R.* 550), says that the proceeding is pending until the time to pay the compromise expires; thereby admitting, that when that time arrives the cause is ended. *Ex parte Mathews* (10 *L. R. Ch. App.* 304), MELLISH, J., in speaking of just such a case, says: "It is too late for the court to allow him to have it

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now." (This was in that case really an *obiter dictum*, but we submit is entitled to great weight.) And he adds: "There is no section of the act that deprives [the creditor] of his rights, and he is therefore entitled to pursue his ordinary remedies as a creditor."

II. We beg to place, what we cannot but think must be a controlling consideration, in a point by itself, though really belonging in Point I. The act says that (upon certain notice) at a certain place, at a certain point of time, if, upon a certain statement, a creditor is named, he is bound; if not, he is not. That certain point of time in this case was March 1, 1877. That certain place was Register Fitch's office; that certain statement was a piece of paper, with certain names thereon written. Plaintiffs' names were not thereon; and they are not on it to this day. A certain other piece of paper—an additional statement—was, by order of August 16, ordered to be recorded, but that statement was not in existence at this certain place, on this certain day. That additional statement was not the statement presented to the meeting of creditors on March 1. And no order of any court can make that additional statement the one presented to that meeting on March 1. You may pile Ossa upon Pelion; you cannot make a fact, *nunc pro tunc*, by any subsequent proceedings, order or decree. Not even—if with all reverence we may be allowed the expression—not even the Most High Judge Himself can do that. This court is called upon to examine this certain statement, presented on a certain day, at a certain place, to certain people. It inspects that statement—it finds that our names are not upon it. No further evidence is material. The act says we are not bound. This is the whole gist of the case in a nutshell. The statement is so clear that we should apologize to the court for the length of our argument, and that apology is that the case is one of first impression, and due respect to the

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court requires its candid submission upon every point that may possibly arise.

III. The refusal to direct a verdict for plaintiffs on the second cause of action was error, and the exception thereto was well taken. The resolution accepting the compromise was on March 1, 1877, and was recorded March 16, 1877. The second note did not fall due till a month after, April 13. Defendant's liability was as indorser. In his petition in bankruptcy he only prayed (he could only pray) for a discharge from his provable debts. A discharge in bankruptcy only affects provable debts (*U. S. Rev. Stat.* tit. Bankruptcy, § 5119). And where a liability is contingent, like that of an indorser—a liability which may never become fixed, for the contingency may never happen—it is not a provable debt until the event happens, and unless that event happens before the final dividend is declared (*U. S. Rev. Stat.* § 5069; *In re Loder*, 4 *N. B. R.* 190). Now, it will be said that there has been no final dividend declared in this case, because the proceedings in bankruptcy were superseded by the proceedings in composition (*In re Becht*, 12 *N. B. R.* 201), therefore, the debt was provable; therefore, it is affected. The answer is obvious. If, as is held in the case just cited, and in a number of others, that proceedings in composition take the place of proceedings in bankruptcy (which we do not deny, for in composition no certificate of discharge is given or is necessary, *In re Becht*, 12 *N. B. R.* 201); then there must be some criterion to determine what debts are or are not provable in composition, so as to be affected by the composition proceedings, and as the amendment of the bankrupt act providing for composition does not, in terms, provide what debts shall be provable in composition, it must be deemed that those debts which are provable in bankruptcy shall be, and none other, provable in composition (LOWELL, J., *In re Trafton*, 14 *N. B. R.* 507, says: "The word creditor, here

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plainly means all who have debts provable in bankruptcy"). And analogy then steps in and says that what the final dividend is to bankruptcy, the resolution of compromise of the creditors is to the composition. Because by that resolution is declared what the dividend shall be, and by its very effect it is a final dividend. This must be so. Otherwise, how could an offer of compromise ever be intelligently acted on? The creditors ought not to be compelled to wait five, ten months, ten years for the happening of an event which may not happen. Estates must not be tied up. The very policy of the act forbids this. But the proportion which a debtor can pay and what is the interest of the creditors to accept, could not be determined if that proportion is to be varied by subsequent events. Their resolution, then, is *pro hac vice* the declaring of the final dividend. The same result is reached from another point. Suppose, in this case, that we had been named, and had appeared at the meeting to vote on the resolution, March 1. We could not have proved this second note under section 5069. We could only have been reckoned as creditors for \$256.99, in determining the amount in value of the creditors necessary to pass that resolution. As to our second note, we would be unheard. And yet that second note, if provable, might be sufficient to prevent the resolution from being passed by the requisite number of creditors in value. Would not the bankrupt and the other creditors very justly oppose that note being reckoned? They would say, and say truly, it is not a provable debt, it cannot be reckoned. How, then, can the bankrupt turn round and say now, it was provable? But if not provable, it had no standing; if it had no standing, it is unaffected. If unaffected, we must recover on it now. For the only defense to it is certain proceedings, which do not affect it. It is no answer to say the bankruptcy court has passed on this, for it was never before the court. It is

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a question which can only be raised in the court where suit is brought, and whether a debt was a provable debt or not, must always be decided in the court where the discharge or composition is pleaded (see *In re Halford*, 19 *L. R. Eq.* 436).

Chamberlain, Carter & Eaton, attorneys, and *F. K. Pendleton*, of counsel, for respondent, urged :—I. (A) On behalf of the plaintiffs, it is claimed that the proceedings were irregular.

First. The creditors, having received the dividend under the first composition, were not entitled to vote. The decision of the bankrupt court, overruling the objection, was correct. I. A discharge in bankruptcy only relieves the debtor from personal liability. The debt is not extinguished (*Bowery Savings Bank v. Clinton*, 2 *Sandf.* 117; *Storm v. Waddell*, 2 *Sandf. Ch.* 525). A discharge only affects the remedy, and must therefore be specially pleaded (*Bircham v. Creighton*, 10 *Bing.* 11). For the same reason an express promise to pay revives the liability (*Stern v. Nussbaum*, 5 *Daly*, 382). Proceedings in composition are an alternative method of effectuating the purposes of the bankrupt law (*In re Lytle*, 14 *N. B. R.* 458; *In re Becket*, 12 *N. B. R.* 201; *Mason & Hamlin Organ Co. v. Bancroft*, 1 *Abb. N. C.* 415). They must be specially pleaded (*In re Tooker*, 14 *N. B. R.* 35). A composition by a principal debtor does not discharge the surety (*Mason & Hamlin Organ Co. v. Bancroft*, 1 *Abb. N. C.* 415). II. The word "creditors" in the bankrupt act designates those entitled to share in the estate, without reference to whether the liability of the debtor has been determined or not (*U. S. Rev. St.* §§ 5092, 5093, 5094, 5096, 5097, 5039). III. The composition under the first resolution was not completed at the time the additional meeting was held. Although the order directing the recording of the resolution and the filing

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of the statement of debts and assets had been made, the estate still remained in the hands of the assignee, under the control of the court, no final order directing it to be turned over to the bankrupt having been made. Under section 17 of the amendatory act the court had power to set aside the composition. If this had occurred, assuredly these creditors would have been entitled to share in the estate, had any additional dividend been realized.

Second. That the case at bar is not within the meaning of the clause allowing the statement of debts to be corrected, or an additional resolution, varying the terms of a composition, to be passed. This involves the interpretation of the act itself, and the powers therein granted. I. The bankrupt act is not a penal statute; on the contrary, it is remedial in its nature, and should be liberally interpreted with a view to effect the purpose contemplated (*In re Brentano*, 3 *N. B. R.* 329; *In re Silverman*, 4 *N. B. R.* 532). The strict rules of construction which are applied in cases where a special statute gives to a court a power to do a particular act, have no application to a case where general jurisdiction over an extensive subject is given (*In re Cal. Pac. R. R. Co.*, 11 *N. B. R.* 193). The composition clause, in the first place, provides that it shall only be binding on the creditors named in the statement. This is to prevent a fraudulent omission of any creditor. It is not meant to give to the creditor the advantage of every inadvertence. Hence the act provides that such a mistake may be corrected, when the rights of the other creditors will not be thereby injuriously affected. II. The only limitation to the power to vary the original provisions is, that such variation shall be without prejudice to any "person" taking an interest thereunder. The word "person" in the above limitation does not include "creditors" (*In re Glover*, 43 *Law Journal, Bankruptcy*, 4). III. The statute con-

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templates that the correction shall be made after the order confirming the composition (*In re Scott*, 15 *N. B. R.* 87; *In re Glover* [above]). IV. The provision that the composition shall not affect the rights of creditors omitted from the statement of debts was not meant to nor does it in any way qualify the provisions allowing a variation of the terms of a composition and the correction of a mistake in the statement; they relate to entirely different matters. The former limits the effect of a composition completed. The latter regulate the proceedings to effect a composition.

Third. That jurisdiction of the person of the plaintiff was not acquired. I. The plaintiffs appeared generally in the proceedings in the bankrupt court by filing a proof of debt. II. By the terms of section 17 of the amendatory act every additional resolution must be passed and proceeded with in the same manner and with the same consequences as the original resolution. It is evident that it is an entirely new and independent proceeding, not relying for its validity on anything which has gone before. That the plaintiffs received due notice of the proceedings to pass the additional resolution, and attended at the meetings called for that purpose, is undisputed. It is by the composition accepted by the additional resolution that the plaintiffs are barred. III. The jurisdiction of the district court of the United States is presumed until the contrary is shown. In that respect it stands on the footing of a court of general jurisdiction (*Chemung Canal Bank v. Judson*, 8 *N. Y.* 254). Having general jurisdiction of the subject-matter and of the bankrupt, actual notice is not necessary to give the court jurisdiction of the creditors. It is well settled that the omission to give notice to the creditors does not render a discharge void; although a fraudulent omission would sustain direct proceedings to set the same aside (*Platt v. Parker*, 13 *N. B. R.* 14; *Stern v. Nussbaum*, 5 *Daly*,

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382). By a parity of reasoning, creditors properly described in the statement of debts are concluded by a composition, although they received no notice of the proceedings. In case of a fraudulent omission the proper remedy is by direct proceedings, to set the composition aside (*In re Reiman Friedlander*, 13 *N. B. R.* 128). (B) Each and every of the foregoing questions was raised and passed upon in the bankrupt court. That decision is conclusive on these parties. It cannot be attacked collaterally. I. That an adjudication by a court of competent jurisdiction is conclusive on the parties as to every question of law and fact directly involved, is well established, whether the adjudication be by judgment, order or decree (*Dwight v. St. John*, 25 *N. Y.* 203). II. The final order in composition is an adjudication, within the above rule, and cannot be called collaterally in question (*Beebe v. Pyle*, 1 *Abb. N. C.* 412; *Smith v. Engle*, 14 *N. B. R.* 481). III. Where a court, having general jurisdiction of the subject-matter, and the parties appearing, is obliged in the course of regular proceedings before it to pass upon the question of its own jurisdiction in the particular case, such adjudication is within the above rule, and can only be called in question by direct proceedings for review. For all the purposes of the rule the court has jurisdiction (*Fisher v. Hepburn*, 48 *N. Y.* 41; *Rusher v. Sherman*, 28 *Barb.* 416; *Monnell v. Dennison*, 17 *How.* 422; *Price v. Peters*, 15 *Abb. Pr.* 197; *King v. Poole*, 36 *Barb.* 242; *McMahon v. Mutual Benefit Life Ins. Co.*, 12 *Abb. Pr.* 28). The adjudication of the district court as to whether it had acquired jurisdiction of the plaintiff, involving, as it does, the interpretation of the bankrupt act, is peculiarly within the rule of the above cases. The plaintiffs, having taken no step to review that decision, are concluded by it in this court. Was defendant's liability on the second note discharged by the composition? I. The plaintiffs are concluded by

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the adjudication in the district court. *Beebe v. Pyle* (1 Abb. N. C. 412, and 71 N. Y. 20), holds that as to all questions touching the indebtedness, the composition proceedings are an adjudication not to be questioned in another court. If the claim on the second note is not within the effect of the composition proceedings, the plaintiff should have raised that objection at the time.

(a) An adjudication is conclusive between the parties on all questions involved, whether raised or not (*Smith v. Eagle*, 14 N. B. R. 481). (b) The question was distinctly before the court. It appeared in the proceedings that the debt was due at the date of the meeting at which the correction in the statement was made. By allowing the correction, the bankrupt court in effect held it was not necessary that the liability of the defendant as indorser should have become fixed at an earlier date in order to be discharged by the composition. It cannot be supposed that the court allowed a correction for the purpose of inserting a claim which would not be discharged. II. Assuming that a composition by analogy to the rule in ordinary proceedings discharges provable debts only. The debt of an indorser may be proved at any time after his liability becomes fixed, and before the final dividend is declared (*U. S. Rev. Stat.* § 3069). The defendant's liability on the second note became fixed on April 13, 1877. The meeting at which the additional resolution was passed was held May 4, 1877. The time fixed for payment by the first resolution was April 16, 1877. (a) Payment of the composition corresponds to declaring the final dividend in the ordinary proceedings. (b) The composition accepted at the additional meeting does not relate back to the original proceedings. It is in no proper sense an amendment. It supersedes the former proceedings as completely as if they had lapsed. III. The bankrupt act distinctly specifies what debts shall be discharged by the ordinary proceedings in bankruptcy.

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The composition clause provides generally that the same shall be binding on all creditors described in the statement of debts. *Bamberg v. Stern* (*Daily Register*, January 11, 1878), holds that a debt contracted in fraud, although not discharged by the ordinary proceedings, will be by a composition, if included in the statement of debts (*In re Shafer*, 17 *N. B. R.* 116; *In re Rogers*, 18 *Id.* 252; *Wells v. Lamprey*, 16 *Id.* 205). To the same effect. The court, commenting on the composition clause, says: "It will be observed that the statute under consideration does not exempt from its operation any class of debts. It in terms declares that the composition settlement shall be binding on all the creditors whose names and the amount of whose debts are mentioned in the statement produced at the meeting at which the resolution has been passed." *In re Haskell* (11 *N. B. R.* 164), holds that the fact that a bankrupt gave a preference is not a reason for refusing to grant the final order in composition, although it would prevent a discharge in the ordinary proceedings. That congress could provide for the discharge of all claims of every kind, by composition or the ordinary proceedings, is evident. The statute expressly limits the effect of a discharge to certain claims. Are these limitations to be considered applicable to composition proceedings? The above cases show—I. That section 5117 of the Revised Statutes, excepting certain provable debts from the effect of a discharge, does not apply to a composition. II. That the causes specified in section 5110 of the Revised Statutes, although they prevent a discharge, are no reason for refusing to confirm a composition. The claim against an indorser, even before the maturity of the note, is a debt, and the holder thereof a creditor within the meaning of the words. So it is held that persons liable for another as indorser or surety, are creditors, and an assignment for the benefit of creditors

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preferring such claims is not void, although the obligation had not matured at the time the assignment was made (*Cunningham v. Freeborn*, 11 *Wend.* 240; *Read v. Worthington*, 7 *Bosw.* 628; *Hendricks v. Robinson*, 2 *Johns. Ch.* 304; *Brainerd v. Dunning*, 30 *N. Y.* 211). If, then, the word "provable" were omitted from section 5119, Revised Statutes, such claim would be discharged. Does section 5119, Revised Statutes, limiting the effect of a discharge to provable debts, apply to composition proceedings? *In re Bailey* (2 *Wood*, 222), *BRADLEY, J.*, seems to hold that a demand, although not provable, would be discharged by a composition. I. The grounds upon which sections 5117 and 5110 have been held not to apply to composition, would seem equally strong in this case, viz.: The composition clause contemplated leaving all questions to the decision of the creditors. II. The omission to specifically extend its application to cases of composition is significant. III. The limitation should not, by implication, be extended to composition cases, in the absence of a very clear intent to that effect. It will render the resort to composition proceedings impossible in a large number of cases. IV. There would seem to be many reasons for excluding from a share in the bankrupt estate claims of uncertain value. The expense and delay caused to the other creditors if the bankrupt court were obliged to assess the amount of such claims. The opportunity thereby offered for establishing fraudulent and fictitious claims against the estate, to the detriment of the other creditors. From the different nature of the two proceedings, these considerations have much less weight in composition proceedings.

By THE COURT.—SEDGWICK, J.—The composition, on which the defense relies, is contained in the additional resolution, varying and adding to the resolution

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passed at a first meeting. If that additional resolution has validity under the bankruptcy act, the plaintiffs are bound by its terms. There had been a former resolution, duly recorded and filed. The additional resolution extended the time named in the first resolution, for the payment of the composition amounts, and by force of the act had reference to the statement of debts ordered by the court to be filed, and which was made by the debtor, at the meeting when the second resolution was passed. The statement of debts made for the purposes of the first resolution did not contain the names of the plaintiffs as creditors; but at a general meeting of creditors, called for the purpose, and which was the same meeting called to vary and add to the first resolution, the statement was corrected by inserting plaintiffs' names. The additional resolution had reference to the corrected statement.

By section 17 of the bankruptcy act of June 22, 1874 (§ 5103, A), "The provisions of a composition, accepted by such resolution, in pursuance of this section, shall be binding on all the creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors." This section clearly embraces a resolution made by varying or adding to a former resolution.

The statement was corrected by the addition of plaintiffs' names, under that part of the same section which says, "Any mistake made inadvertently by a debtor in the statement of his debts, may be corrected upon reasonable notice and with the consent of a general meeting of his creditors."

The appellants contend that the bankruptcy court had no jurisdiction to order the additional resolution to be filed and recorded. The claim is that the juris-

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diction was dependent upon the existence of certain things in fact, and that the court could not gain jurisdiction by adjudging that the facts existed, or, in substance, that actual facts were conditions precedent of the rightful jurisdiction. These facts are, that to vary or add to a composition already made, the resolution must be passed by persons who are then creditors, the words of the section being: "The creditors may by resolution add to or vary the provisions of any composition previously accepted by them;" that those who passed the additional resolution were not creditors, inasmuch as they had received the amounts under the first resolutions, and thenceforth ceased to be creditors. Also, that extending the time of payment of amounts already paid, did not add to or vary the provisions of the composition previously accepted by them, especially as the statement of debts, although corrected as to plaintiffs' names, was not a part of the resolution. Also, that the provision "that any mistake made inadvertently, by a debtor, in the statement of his debts, may be corrected," does not and was not meant to refer to the omission of a name of a creditor.

The issue is to be determined by ascertaining what the bankruptcy act meant should be presented for adjudication, and its meaning is conclusive. When the terms and true construction show that the court is called upon to examine and decide a particular matter, the court then obtains jurisdiction as to all matters which are involved in the examination, and its decision cannot be re-examined collaterally.

In the proceedings in question, the first steps are taken by creditors and the debtor, and these steps do not, of themselves, involve any adjudication by the court. But a resolution having been passed, the act declares, by a provision that is applicable to both resolutions and additional resolutions: "Such resolution, together with the statement of the debtor as to his

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assets and debts, shall be presented to the court, and the court shall, upon notice to all the creditors of the debtor, of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section, and if satisfied that it has been so passed, it shall, subject to the provisions herein contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded, and statement of assets and debts to be filed, and until such record and filing shall have taken place, such resolution shall be of no validity."

This language plainly calls upon the court to pass judicially upon the sufficiency of the preliminary steps, to give a right to have the resolution recorded and therefore made valid. The intent of the act is made more apparent by the consideration that the terms of the act, as to what is necessary to perfect the composition, are to be construed in their relation to the policy of the whole act, and it must have been meant that the district court should have exclusive judicial power in this regard. If this be not so, the district court could be ousted of jurisdiction by any other court, that, upon its own interpretation, should decide that some of the terms now referred to did not have the meaning given to them by the district court.

I, therefore, am of opinion that the district court possessed jurisdiction to determine the validity, under the act, of the *rei ipsæ* of the additional resolution, and also to determine that such resolution was to be applied to "the statement of assets and debts" that the court ordered at the same time to be filed.

I do not see that the court assumed a jurisdiction not conferred, when it decided that the omission of the plaintiffs' names from the first statement was "a mistake made inadvertently by a debtor in the statement of his debts." The argument is, that the act meant a

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mistake of a different kind from an omission that resulted in the persons omitted not being bound by the composition. A conclusive answer to this is, that if the position is supposed to be correct, nevertheless, it only shows that an error was made—not that the court was without jurisdiction. But to my mind it is not sound, because the provision as to who shall be bound is intended to become operative after the court has exerted its due powers as to an additional statement and resolution. If the omission were a mistake, and has been corrected, then the provision as to who shall be bound does not operate in plaintiffs' favor.

The general result is, that the court in bankruptcy competently passed upon the matters which the learned counsel for the appellant has maintained could be examined collaterally in this action.

I have not, as yet, intended to embrace the claim that the plaintiffs did not have the notice, which the bankruptcy act provided for them, and therefore that they are not bound by the composition. This may be settled, however, by adverting to the proposition already discussed. Not keeping out of sight that, so far as the first resolution was concerned, the plaintiffs were not bound, it is the fact that they had due notice of the proceedings which ended in the additional resolution, and were therefore bound by the competent action of the court in respect thereto. Their relation to the controversy was the same as it would be if a debtor were allowed to bring an action to establish the validity of a composition agreement against the plaintiffs as creditors, and they, being served with process to answer as defendants, were bound by the result of the litigation, whether they defended or refused to defend. The process having been served, the court could competently require of them, that, before opposing, or as part of their defense, they should make due proof, according to the practice of the court, of their being creditors in

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fact. Having received due notice, their omission to prove their debt, as ordered by the register, was voluntary on their part, but had no reference to the question of jurisdiction.

I am further of opinion, that the second promissory note, that fell due after the first resolution, but before the meeting for the additional resolution, was bound by the composition. On the literal meaning of the act, and in respect of the assets of the bankrupt that would go to an assignee, it fell due before any dividend. As to the composition proceeding, it fell due before the opportunity had passed for the plaintiffs receiving an amount in composition, in proceedings that were competently held to be valid. From what has been said, it follows that the plaintiffs are bound by the specification of the amount of indebtedness due to them, as made in the statement presented by the debtor. The plaintiffs had an opportunity to have the amount increased by the small sum which makes the difference, and voluntarily omitted to object. This brings them within the spirit and letter of the provision, that the composition shall be binding on all the creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement of the debtor, produced at the meeting at which the resolution shall have been passed.

Judgment affirmed, with costs.

VAN VORST, J., concurred.

Statement of the Case.

JAMES J. THOMSON, AS RECEIVER, PLAINTIFF, v.
CHARLES MCGREGOR, DEFENDANT.

I. *Receiver's bond.*

1. SURETIES' LIABILITY.

(a) Non-payment by receiver, pursuant to order, made after receiver's removal ordering him to pay a certain sum, "being balance of trust funds in his hands."

1. *The surety is liable for the amount ordered to be paid, although not a party or privy to the proceeding resulting in the order.*

1. DEFENSE, WHAT IS NOT. The surety cannot defend, either wholly or in part, on the ground that the receiver before the execution of the bond, had disposed of, or since its execution had properly disbursed the whole of the trust funds, or of a part thereof, so that the whole of the sum mentioned in the order was not at its date in his hands. The order is conclusive on him.

(a) CONDITION OF BOND IN THIS CASE. "Now the condition of this bond is such that if the said . . . shall henceforth faithfully discharge the duties of his trust as said receiver, then this obligation to be void, otherwise to be in full force and effect."

2. PLAINTIFF, WHO MAY BE.

A. One authorized by the court to sue; the bond running to the People of the State of New York.

B. A receiver appointed in the place of one removed, may sue on the bond given by the removed receiver; he is the party in interest.

II. *Bond to the people, who may sue on.*

1. See *supra*.

Before SEDGWICK and SPEIR, JJ.

Decided April 7, 1879.

Exceptions directed to be heard at general term, in first instance, after verdict directed for plaintiff.

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The complaint, after sufficiently alleging that one Riker had been appointed by the court of common pleas, in an action there pending, receiver of all the property, &c., of a certain firm, further alleged that, in pursuance of an order set out, the defendant here joined in a bond with the receiver, conditioned that if the said Riker "shall henceforth faithfully discharge the duties of his trust as such receiver, then this obligation to be void, otherwise to be in full force and effect;" that by a certain order, &c., afterwards made, the receiver "was removed from his position as said receiver, and ordered to pass his accounts," and the plaintiff was thereupon appointed receiver, &c.; that in the accounting by said Riker, "an order was, &c., duly made by said court in said action, adjudging that there was a balance then in the hands of him, said Riker, of the trust funds, that he had received as said receiver, &c., of \$2,099.27, with interest from, &c., and directing said Riker to forthwith pay said sum to this plaintiff, as receiver, as aforesaid;" that on, &c., the plaintiff duly demanded payment of said sum, &c.

The answer, in substance, alleged that the said Riker had, from the time of the execution of said bond, in all things faithfully discharged the duties of his trust as receiver; that defendant was not a party to the proceeding for the accounting by Riker, and had no notice or knowledge of its pendency; and further, by special averments, that Riker had not violated any duty of his trust.

On the trial, the plaintiff proved the allegation of the complaint above stated.

The defense proved that the defendant was not a party to and had no notice of the proceeding in which the order was made that found the balance against the receiver.

The defendant further offered to prove by facts specially stated, such as payments made by the receiver

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before, and proper payments made after, the execution of the bond, that the receiver had performed his duty. The court refused to allow the testimony offered, and exception was taken.

There were other exceptions noticed in the opinion.

The court directed a verdict for plaintiff, and further, that the exceptions be heard, in the first instance, at general term.

Andrew Gilhooly, attorney, and of counsel, for plaintiff, urged :—I. The bond is to be construed and the rights of the parties to be determined as if the bond had been conditioned in express terms that said Riker shall henceforth obey all orders of the court, touching the trust fund ; and the order directing payment is conclusive (*Schofield v. Churchill*, 72 *N. Y.* 565 ; *Thomas v. Hubbell*, 15 *Id.* 407.) These cases “are not departures from, or exceptions to the general rule, that a judgment concludes only parties and privies, but do not fall within that rule at all, being dependent only on the principle that one may contract to be answerable to another upon such lawful conditions as he pleases” (*Thomas v. Hubbell*, *supra*). The following cases illustrate the distinction : *Douglass v. Howland*, 24 *Wend.* 35 ; *Rapelye v. Prince*, 4 *Hill*, 119, 122.

W. U. Northrop, attorney, and of counsel, for defendant, urged :—I. The defendant's bond was executed more than six months after Riker began to discharge his trust as receiver, and such being the fact, the word “henceforth” was interlined in the condition, so that the obligation was simply that he would, from that time, faithfully discharge his trust. Under this restriction, the defendant executed the instrument, and bound himself only for the faithful discharge of his trust in the future. The court, therefore, erred in ruling that the bond covered all the acts of the re-

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ceiver before the execution thereof. It is a fundamental principle that "a surety can only be charged where the case is brought within the precise terms of his contract." "Thus, the condition of a bond may be considered to explain the obligatory part" (2 *Parsons on Cont.* 503; *Birckhead v. Brown*, 5 *Hill*, 634, 640, 641; *McCluskey v. Cromwell*, 11 *N. Y.* 598; *Willet v. Kipp*, 12 *Hun*, 476). In the case of *Bissell v. Saxton* (66 *N. Y.* 60), the court of appeals say that "the engagement of the surety is for his future, and not his past conduct; and it would be a gross imposition upon them, in the absence of a special stipulation to that effect, to import into their undertaking responsibility for prior delinquencies. This has been frequently recognized" (citing *Myers v. United States*, 1 *McLean*, 493; *Farrar v. United States*, 5 *Pet.* 372, 389; *United States v. Boyd*, 15 *Pet.* 187; *Vivian v. Otis*, 1 *American R.* 199; *Willet v. Kipp*, 12 *Hun*, 474). The case of *Schofield v. Hustis* (9 *Hun*, 157), is clearly distinguished from defendant's case. The bond filed in that case was conditioned, among other things, that the executor "shall obey all orders of the surrogate, touching the administration of the estate committed to him." The court say, "the bond was not conditioned, that defendant Churchill would account for all moneys received thereafter; it was that he should obey all orders of the court, touching the estate."

II. To the accounting of Riker the defendant was not a party, but an entire stranger, having no knowledge of it until payment of the alleged deficiency was demanded of him. It is therefore submitted that he is in no manner bound or concluded by the order of the court of common pleas on said accounting. Being a stranger to that proceeding against Riker, he had no opportunity to examine witnesses, or to defend himself, or to appeal from the order (1 *Phillips Evidence*, 2

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ed. 326, 327; 2 *Cowen & Hill's Notes to Phillips Evidence*, 815, 816, note 569). The case of *Hotchkiss v. Platt* (7 *Hun*, 56), by implication, sustains the principle that no one who is not a party to the proceeding can appeal from an order to which he was a stranger, and therefore he is not bound by it, except in certain cases, by the terms of the contract, cited in the 3d point (*Swartwout v. Payne*, 19 *Johns.* 294; *Bartlett v. Campbell*, 1 *Wend.* 50; *Douglass v. Howland*, 24 *Id.* 35, 52-59; *Clark v. Montgomery*, 23 *Barb.* 464).

III. The following cases established the principle that where the surety has notice and acts upon it; or where, by the terms of the contract, he waives notice of adjustment of his liability; or consents to an *ex parte* adjustment of the sum he is obligated to pay; he will be bound to pay the amount fixed upon. This is the essence of his contract, except when he acts on notice (*Blasdale v. Babcock*, 1 *Johns.* 518; *Kip v. Brigham*, 6 *Id.* 159; *Poillon v. Volkenning*, 11 *Hun*, 385; *Hotchkiss v. Platt*, 7 *Id.* 56; *Methodist Church v. Barker*, 18 *N. Y.* 463; *Cuddeback v. Kent*, 5 *Paige*, 92, 97, 98).

IV. It is submitted that inasmuch as the bond only covered future breaches of trust and that the defendant was not concluded or bound by the proceedings in the accounting, that the plaintiff should have alleged in his complaint a specific breach of trust, after the execution of the bond, and also the precise amount of damages for which the defendant was liable for Riker's dereliction of duty after the bond was given, and should have shown affirmatively a case, under such pleadings, against the defendant. Hence the court erred in denying the defendant's motion to dismiss the complaint, on the ground that it does not contain facts sufficient to constitute a cause of action. And for like reason the court erred in denying the motion to dismiss

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the complaint on the ground that the plaintiff had not established a cause of action.

V. The motion made by defendant to dismiss complaint because it did not state facts sufficient to constitute a cause of action should have been granted, on the grounds: 1st. The complaint alleges that the bond upon which the action is brought was given to the people of the State of New York, and not to the plaintiff, and it does not appear from the complaint that he has any interest in it, by assignment or otherwise; hence he cannot maintain this action (*Annett v. Kerr*, 28 *How.* 324). Section 814 of Code of Civil Procedure, relates only to a bond given as prescribed by law. There is no law requiring a receiver of copartnership property to give a bond; it is discretionary with the court whether such bond shall be required or not, hence this bond is not such a bond as is provided for by that section. 2d. Complaint alleges that Riker was appointed receiver, &c., July 9, 1874; that the bond was given January 30, 1875, for the faithful performance of his duties after that time, but contains no allegation that Riker did not faithfully perform his duties as receiver, after the giving of said bond; or any allegation showing any liability on the part of defendant, and no liability can be inferred against a surety.

VI. But if the introduction of the order made by the court of common pleas established a *prima facie* case against the defendant, but which is not conceded, the court erred in holding it conclusive for the sum demanded, and in excluding the testimony of Riker, which was offered by the defendant, to show that no breach of his trust had been committed after the execution of the bond.

BY THE COURT.—SEDGWICK, J.—The most important question is whether the refusal of Riker to pay the

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amount which the order directed him to pay was a breach of the condition of defendant's bond. The condition was, "that if the said Riker shall henceforth faithfully discharge the duties of his trust as such receiver, then this obligation to be void, &c." The only omission to discharge faithfully his duty was the refusal to pay as commanded by the order.

There is no doubt that the order was competently made, and was binding upon Riker ; but the appellant claims that it does not show or prove, as against the defendant, who was not a party or privy to the order, that Riker did not faithfully discharge the duties of his trust. But there seems to be no room for doubt, if it were a duty of the receiver's trust to obey the order, and the refusal to pay was the reverse of a faithful discharge of duty ; the condition of the bond was broken. In such a case, the defendant has contracted that the receiver will pay, and the order and the proceedings leading to it do not comprise something that is binding upon the defendant as an adjudication, but are evidence of the facts as to violation of duty in obeying the order.. Of course, if they were to be used as evidence of some former misappropriation of money, and the defendant was to be bound only if such a misappropriation were shown, they would be incompetent against the defendant.

The cases against sureties upon executors' or administrators' bonds are not precedents here, for such bonds, following the statute, specifically provide in the condition that the principal shall obey the orders of the surrogate. Judge COWEN, who delivered the opinion in *Douglass v. Howland* (24 *Wend.* 35), in deciding *Jackson v. Griswold* (4 *Hill*, 531), gave an illustration which is in point here. He said that the case of *Willey v. Pault*, 6 *Cow.* 74, was not cited by counsel in *Douglass v. Howland*, and was overlooked by the court. "The action was against the surety, in a probate bond condi-

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tioned, among other things, that the executor should settle the estate according to law. The evidence offered was a judgment against the executor, an execution and demand of payment, which the executor refused to make, though he had assets. The judgment was held to be conclusive. With deference, it seems to me that a judgment against the executor and a refusal to pay, the estate having assets, were, *per se*, within the terms of the condition. The test of a failure to settle according to law was an unpaid judgment, and the case was therefore the same in effect as if the condition had said, we will abide all judgments that shall be obtained against the executor." I cannot think that there has been a faithful discharge of duty by a receiver, when he refuses to account and pay as directed by an order, which specifically designates his duty in that respect.

It is urged as a ground of reversal, that in the exact construction which it is claimed is due to a surety's contract, a recovery here, on the ground that has been stated, cannot be maintained, for the reason that, before the order, the principal had been removed from the receivership, and thenceforward his act or omissions could not be the violation of the duties of a trust, which could only exist when the receivership was in existence. I think the proper construction is, that the defendant was to be bound, so long as there was any duty of his principal's trust to be performed, and that included a duty of the trust yet to be performed after his expulsion from the office. The trust and the duty springing from it remained.

I am also of opinion that the order permitting the plaintiff to prosecute the bond, authorized him to bring this action. The people of the State had no property interest in the chose in action. By due authority from the people, the court had used their name as the obligee, that the real party in interest or beneficiary, according to circumstances, might have the

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benefit of the contract. It is as if the name of the clerk or of a third party had been competently used for the purpose. A formal assignment was not necessary. The circumstances were equivalent to that, even if, under the Code, the plaintiff had not an absolute right, as a party in interest, subject to the direction of the court. The court has ordered that the plaintiff prosecute the bond, and for formal purposes may be deemed authorized by the obligee to make such order.

The plaintiff, as receiver appointed to succeed Riker, is the party in interest, and the measure of damages is the amount he would have received if the duty of paying the sum named in the order had been performed.

The defendant's exceptions are overruled, and judgment ordered for plaintiff, on verdict, with costs.

SPEIR, J., concurred.

THE AMERICAN NATIONAL BANK OF NEW
YORK, PLAINTIFF AND RESPONDENT, v. WIL-
LIAM A. WHEELLOCK, DEFENDANT AND APPEL-
LANT.

I. EVIDENCE.

1. PRESUMPTION FROM WITNESS'S OWN TESTIMONY THAT FACT IS THE REVERSE OF THAT WHICH HE TESTIFIES IT TO HAVE BEEN, WHEN IT DOES NOT ARISE.

(a) When a plaintiff, to fasten a liability on a defendant by reason of an act done between a person acting on behalf of the plaintiff, and the defendant, calls as a witness he who acted on plaintiff's behalf, who testified that the act done (to wit, the payment of a sum of money) was done under such circumstances as not to fasten a liability on the defendant (to

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wit, as compensation, pursuant to an agreement between plaintiff and defendant, of which the witness had no personal knowledge, for services rendered by the latter to the former), and who, upon a further examination by plaintiff, in the nature of a cross-examination, allowed on the assumption that he was an adverse witness, gives evidence tending to show that his first statement as to the circumstances under which the act was done was incredible (viz.: an inability to state what the services were for which the payment was made, or to show how and why it was that all the services which the witness had detailed were not fully compensated under an agreement between the parties, without the payment in question), *it cannot be inferred*, that the transaction must have been of a kind that made the defendant responsible.

1. If the examination, in the nature of a cross-examination, successfully showed the first statement to be incredible, the whole account of the witness must go for nothing, as not shown by a credible witness.

2. ADMISSION OF EVIDENCE PROPER AT THE TIME WHEN GIVEN.

(a) CAUSE FOR REVERSAL, WHEN.

1. Where, under one of the aspects of the case as presented by the complaint, evidence was given (under objection as to its relevancy) as to a transaction between a plaintiff or his agent, and a third person named in the complaint, tending to show a great wrong committed on such third person, with a view of sustaining a charge made in the complaint, of a conspiracy between the defendant and such third person, *and no evidence is subsequently given connecting the defendant with such transaction, and the case is submitted to the jury in an aspect to which the evidence so given has no relevancy*, and there is conflict of evidence as to those facts which are relevant to the aspects in which the case was put to the jury, the fact that such evidence may have injuriously affected the defendant in its effect on the jury, as tending to excite sympathy for one side and animosity to the defendant, calls for a new trial.

1. A FORTIORI, when the wrong as to which the evidence is given is of a character entirely different from the conspiracy alleged in the complaint.

3. IMPROPER, EFFECT OF, WHEN NOT OBIATED BY CHARGE.

- (a) Although the case is put to the jury in an aspect on which

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the evidence has no possible bearing, yet if it is calculated to prejudice the jury against the party as against whom it was received and against whom the jury found, on a conflict of evidence as to the facts which do bear on the case in the aspect in which it was put to the jury, *its effect is not obviated by the manner of the submission.*

II. MONEY HAD AND RECEIVED.

1. AGENT, ACTION LIES AGAINST HIM ALTHOUGH HE HAS PAID OVER TO HIS PRINCIPAL, WHEN.

(a) When an agent of a bank, without authority, either because the authority has not been conferred by the bank as a fact, or because it has no power under its charter to confer such power, pays away its money to an officer and agent of another bank *for his bank*, and such officer knows that there is no authority to pay the money and that his bank has no right to take it, *he is liable personally for the money, whether or not he is paid it over.* This is the general rule.

QUERY. Whether he would be liable, if the payment was made to satisfy a claim made *bona fide*, although its character be such that in a case made between the principals it might turn out to be unfounded.

2. FORMS OF COMPLAINT IN.

(a) A form in substance like the former common count, alleging money had and received by defendant to and for the use of plaintiff, is sufficient.

1. *Insufficiency under the form.* A complaint merely alleging that defendant, *without any consideration therefor*, did obtain the money from plaintiff, is insufficient. It is not equivalent to stating that the money was received for the use of plaintiff.

(a) *Effect of previous allegations.* When the complaint contains allegations showing the manner in which the money was obtained, the allegation of no consideration must be considered as made in reference thereto, and as being substantially an allegation that by reason of the matters so alleged there was no consideration.

(b) The complaint may set forth the special circumstances which create the liability.

(c) EFFECT OF FORM OF COMPLAINT AS CONTROLLING EVIDENCE.

1. Under the first form, any special circumstance which creates the liability may be proved.
2. Under the second form, the plaintiff is confined to proof of the special circumstance alleged.

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III. *Evidence.*

1. CONTROLLED BY FORM OF COMPLAINT.

(a) See money had and received, *supra*.

Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

Appeal from judgment entered upon the verdict, of a jury, and from an order denying a motion for a new trial.

The complaint alleged the plaintiff, on, &c., was, &c., an incorporated national bank, and that the defendant was president of the Central National Bank; that at the times, &c., an association of banks known as the Clearing-House, existed, for the purpose of facilitating the settlement of exchanges and balances between the members of the association; that the plaintiff was not a member; that the Central Bank was; that it was essential to the credit of the plaintiff that its exchanges and balances should be settled at the Clearing-House.

That this plaintiff, desirous to secure these advantages, prior to the year 1869, entered into an agreement with the said, the Central National Bank of the city of New York, by which it agreed, for the consideration hereinafter mentioned, to loan its credit and money to this plaintiff, sufficient to enable it from time to time, through said last-named bank, to effect the settlement of its exchanges with other banks, and its clearances through the medium of said association; in consideration whereof this plaintiff agreed to keep or deposit with the said last-named bank the sum of \$50,000. That said parties acted under said agreement for several years, including the years 1869 and 1870, the said defendant during that time being president as aforesaid. That previous to, and during said last-named years, the said plaintiff was financially embarrassed and in impaired credit, and unable, without great effort

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and sacrifice, to maintain itself, and pass the examinations from time to time made by the bank examiners, appointed by the comptroller of the currency of the United States under the laws of Congress. That at the times aforesaid, Charles Callender was such bank examiner, having visitorial power over the banks located in said city under said laws. That the said Charles Callender and the said defendant, prior to July 29, 1869, oppressively and unlawfully conspired together to extort money from this plaintiff, by taking advantage of the embarrassed condition of this plaintiff, and by threats that the said Charles Callender would use his power as such bank examiner to expose said condition of this plaintiff, and subject it to the custody of a receiver, under the laws of Congress in that behalf, and by threats to withdraw the aforesaid aid of the Central National Bank of the city of New York, whereby this plaintiff would be disenabled, from the settlement of its exchanges and accounts with other banks of said city, in the mode requisite for the maintenance of its credit and business through said Clearing-House; and thereafter the said defendant, by the means aforesaid, and the use of such threat, and without any consideration therefor, and with intent to extort money from this plaintiff, did, on or about July 29, 1869, obtain from this plaintiff the sum of \$5,000; and on or about July 6, 1870, did, by the same means, obtain the further sum of \$500; and said sums were, at the dates aforesaid, under the circumstances aforesaid, paid by this plaintiff to the said defendant, and said defendant has not since repaid the same, or any part thereof.

The answer admitted the relation of the two banks to the Clearing-House; that the plaintiff's bank was financially embarrassed; denied the allegation as to the fraudulent and oppressive means of obtaining the money, and that the defendant obtained the money, and proceeded:

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"And for a further answer, this defendant says:

"That the Central National Bank of the city of New York rendered services to the plaintiffs, on various days, between June 1, 1867, and July 29, 1869, which said services were of great value to the plaintiffs, and that, in consideration of such services, and as a compensation therefor, the plaintiffs paid to said Central National Bank, on July 29, 1869, the sum of \$5,000.

"That the plaintiffs paid the same voluntarily, and without demand from the said Central National Bank of the city of New York.

"That the said sum of money is the same sum of money and the same payment, falsely alleged in the complaint to have been made to this defendant on the date aforesaid.

"And for a further answer, defendant says:

"That on July 6, 1870, Joseph Poole was the president of the plaintiffs.

"That said Joseph Poole, on said last mentioned date, paid to the Washington Heights Presbyterian Church, of which church this defendant was the treasurer, the sum of \$500, and that said sum of \$500 is the same sum of money and the same payment falsely alleged by the plaintiffs in their complaint to have been made to this defendant on the date aforesaid."

The facts, that refer to the exceptions passed upon on the appeal, sufficiently appear in the opinion of the court.

Martin & Smith, attorneys, and *Aaron Pennington Whitehead*, of counsel, for appellant, urged:—Officers of a corporation are its agents, and the relation between the corporation and its officers is that of principal and agent (*Field on Corp.* § 184; *Angell & A. on Corp.* c. 9; *Story Agency*, §§ 16, 52, 53). The defendant acted as agent of the Central National

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Bank in receiving the \$5,000, and as agent of the Washington Heights Presbyterian Church in receiving the \$500. The general rule of law is, that if the principal is liable, the agent is not; and if the agent is bound, the principal is not (*Field on Corporations*, § 211). It is the well-settled law of this State, that a known agent receiving money for his principal, without fraud, duress or mistake, is not liable to an action on behalf of a third person, who is ultimately entitled to the money, for neglecting to pay the same upon a request, even although he has not paid it to his principal (*Calvin v. Holbrook*, 2 *N. Y.* 126; *Hall v. Lauderdale*, 46 *N. Y.* 70). But where money has been paid to an agent, for the use of his principal, under such circumstances that it can be recovered back from the principal, and the agent has paid it over, it is the unquestioned law that he is no longer liable to an action to recover it back by the party making the payment (*Mowatt v. McLellan*, 1 *Wend.* 173; *Duff v. Buchanan*, 1 *Paige*, 453; *La Farge v. Kneeland*, 7 *Cow.* 456; *Costigan v. Newland*, 12 *Barb.* 456; *Stephens v. Badcock*, 3 *B. & Ad.* 354; *Sims v. Brittain*, 4 *Id.* 375; *Pinto v. Santos*, 5 *Taunt.* 447; *Snowdon v. Davis*, 1 *Id.* 359). And in the execution of a contract, where the purpose to act for a corporation is manifest, and where it does not appear that there is an intention to assume personal responsibility, the corporation, and not the officer, will be bound thereby (*Field on Corporations*, § 197, and cases there cited; *Dillon on Municipal Corporations*, § 376; *Story on Agency*, § 154, p. 212, note; *Bank of the Metropolis v. Guttschlick*, 14 *Pet.* 19; *Denny v. Manhattan Co.*, 2 *Den.* 115; affirmed, 5 *Id.* 639).

III. The moneys were paid for a good and valuable consideration.

IV. If the payment of these moneys be regarded as a gift, they cannot be recovered, upon the principle

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that in the absence of fraud, executed gifts *inter vivos* are irrevocable.

A gift, once executed, is irrevocable and binding, as concerns the parties thereto, and the executors, administrators and others who derive title through either, or stand as mere representatives, unless such mental incapacity, fraud, force or other error may be set up on behalf of the donor or donee as will usually invalidate contracts.

Of course, so far as concerns the donor's creditors and subsequent *bona fide* purchasers without notice, or in case of a gift of that which one does not own, the transfer cannot operate to the extent of defrauding one whose right is thus paramount to that of the donee, and such persons, under suitable limitations, may impeach the gift accordingly (2 *Schouler on Personal Property*, 114; *Clarke v. Dutcher*, 9 *Cow.* 674; *Mowatt v. Wright*, 1 *Wend.* 355; *Supervisors of Onondaga v. Briggs*, 2 *Den.* 26; *Wyman v. Farnsworth*, 3 *Barb.* 369; *Mut. Life Ins. Co. v. Wager*, 27 *Id.*, 354; *Sprague v. Birdsall*, 2 *Cow.* 419; *New York & Harlem R. R. Co. v. Marsh*, 12 *N. Y.* 308).

The fact that in this case the donor was a corporation, and that its charter did not authorize such a gift, would not vary the principle of law (*Angell & Ames on Corporations*, note a, p. 243). The question is very fully discussed in *Bissell v. Michigan Southern & Northern Indiana R. R. Co.*, 22 *N. Y.* 258. To the same effect, see opinion of COMSTOCK, Ch. J., in *Parish v. Wheeler*, 22 *N. Y.* 494.

V. There was manifest error in admitting the testimony of conversations and transactions between Charles Callender and the president of the American National Bank, at which conversations the defendant was not present, and with which transactions he had no connection whatever. Such testimony was calculated to prejudice the minds of the jury. The claim of the

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plaintiffs was that Callender and the defendant had conspired to extort money from the plaintiffs. But anything which transpired between Callender and the president of the plaintiffs, in the absence of the defendant, without his knowledge, is not admissible, upon any principle of law.

In view of the fact that there is not a scintilla of testimony in the case tending to show any conspiracy between Callender and the defendant, of what possible consequence was it, whether there were any transactions, lawful or unlawful, between the president of the plaintiffs and Callender? The object of the plaintiffs' counsel, evidently, was to create confusion in the minds of the jury, and to induce them to believe that the defendant was in some way mixed up with what took place between Callender and the president of the plaintiffs. The verdict should be set aside upon these exceptions, if for no other reason.

Beach & Brown, attorneys, and *Wm. A. Beach*, of counsel, for respondent, among other things, urged:—I. Although the complaint alleges that the moneys sought to be recovered were oppressively extorted from the plaintiff by means of a conspiracy between the defendant and the bank examiner Callender, proof of the combination was not essential to a recovery. It is sufficient if it appeared that defendant had obtained the property of plaintiff without consideration and tortiously. This would be so had several been joined in the action as co-conspirators. No confederacy being proved, a recovery could be had against a single defendant, against whom a tort was proven, with damage to plaintiff (*Hutchins v. Hutchins*, 7 *Hill*, 104; *Savarty v. Vanarsdale*, 65 *Penn.* 507; *Jones v. Baker*, 7 *Cow.* 445; *Gardiner v. Pollard*, 10 *Bosw.* 674, 687; *Patten v. Gurney*, 17 *Mass.* 182, 186; *Sheehan v. Shanahan*, 5 *How. Pr.* 461; *Conaughty v. Nichols*, 42 *N. Y.* 83;

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Austin v. Rawdon, 44 *Id.* 63). Besides, the complaint charges that defendant obtained the moneys without consideration, and with intent to extort, by means of threats to withhold the aid of the Central Bank, in making plaintiff's exchanges.

II. If, therefore, there was sufficient in the proof to justify the jury in finding that defendant became wrongfully possessed of the funds of plaintiff, he was liable; especially if it appeared that defendant, for that purpose, used his position as president of the Central Bank to terrify plaintiff with threatened withdrawal of its aid under the contract.

III. It is no answer for defendant, that he received the money as an official, and profited nothing by the extortion. He was the actual recipient. He solicited the smaller sum donated to the church, and knew that plaintiff's officers had no power thus to appropriate it. If the jury believed Mr. Poole, the benevolence was a pious fraud to cover usury. In either alternative, defendant was a wrong-doer and liable. So too, as to the \$5,000; defendant received it, knowing it was transferred without consideration; in the language of his answer "voluntarily and without demand from the said Central National Bank." He knew that the officers of plaintiff had no right to squander its funds by gratuities of this character. He was a participant in both wrongs, with full knowledge. The jury had the right to say, under the evidence, that he was the efficient actor in committing both. Occupying that position, he could not defend upon the plea that he exacted or received the moneys for others. He was their agent and colleague in the wrongful act. Indeed, he was the power accomplishing the act. The wrong was his, not excused by his folly in sinning for the good of his bank, or his church (*Pease v. Smith*, 61 *N. Y.* 477; *White v. Mechanics' Bank*, 4 *Daly*, 225; *Guille v. Swan*, 19 *Johns.* 381; *Bishop v. Ely*, 9 *Id.* 294; *Olm-*

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stead *v. Hotaling*, 1 *Hill*, 317; *Lansing v. Montgomery*, 2 *Johns*. 382).

IV. Mr. Poole, the president of plaintiff, was but its agent, and was himself liable for an abuse of trust, in the misappropriation of its funds; and so with its other officers (*Austin v. Daniels*, 4 *Den.* 299; *Grocers' Bank v. Clark*, 48 *Barb.* 26). Their liability arises out of their wrongful disposition of a trust fund. That is a willful violation of duty, and tortious. Every *particeps criminis* is likewise liable. Hence the defendant receiving money wrongfully diverted from a trust fund, with full knowledge of the wrong, became a *tortfeasor*, and, like all such, is responsible jointly and severally (*Hill on Trusts*. 520; 1 *Story Eq.* § 422; 2 *Id.* § 1258; see *supra*, Point III).

V. The evidence fully justified a finding by the jury, that the moneys sought to be recovered were extorted from plaintiff, through a conspiracy between defendant and Bank Examiner Callender. It is not, however, necessary to discuss that proposition under the charge of the court below. If the points already argued are tenable, the charge was erroneous.

VI. It cannot be said that the declarations and acts of Callender were inadmissible until the conspiracy was shown. Whatever might have been the rule formerly, it was within the discretion of the trial court to admit them at any stage of the trial (*Place v. Minister*, 65 *N. Y.* 89; *Bruce v. Kelly*, 7 *Jones & S.* 27; *Ormsby v. People*, 53 *Id.* 472; *Adams v. People*, 9 *Hun*, 89). All this class of objections was, however, avoided by the mode in which the case was submitted to the jury. By the charge of the court the issue of conspiracy was withdrawn from the case. If defendant was liable as a wrong-doer without proof of it, all the evidence given in support of it was needless and harmless.

VII. The proposition by the appellant, in his sec-

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ond point, that defendant acted as a known officer and agent, in the receipt of the moneys claimed, and cannot, therefore, be held personally responsible, is sound in the abstract, but entirely inapplicable. First.—The doctrine only applies to causes of action *ex contractu*. It has no application to those arising *ex delicto*. The authorities cited in its support recognize the distinction. In *Frye v. Lockwood* (4 *Cow.* 454) the distinction is very clearly declared. *Hecker v. De Groot* (15 *How. Pr.* 314) is equally explicit.

VIII. It is respectfully urged that the court below erred in holding, substantially, that an action would not lie against one conspirator for a wrong done by several in pursuance of it (*Moon v. Tracy*, 7 *Wend.* 229; *Forsyth v. Edminston*, 11 *How. Pr.* 408). The ruling was harmful only to the plaintiff. It eliminated that right of action from the case, but it left the evidence in support of it pertinent and influential in support of the *quo animo* imputed to defendant. It was effectual to relieve defendant of his disguise of innocent agency.

The points fully presented in other respects the views of the respective counsel on the questions considered by the court.

BY THE COURT.—SEDGWICK, J.—The testimony did not tend to show that the defendant was guilty of any of the tortious acts alleged by the complaint. There was no proof of any conspiracy, or threats, or extortion. The case, however, proceeded, down to the charge of the learned court, as if the cause of action on which the plaintiff rested for a recovery was as stated by the complaint, the defendants obtaining the money by the conspiracy, threats, and extortion alleged. In the course of the testimony, it appeared that a former president of the plaintiff had paid to the defendant, who was president of the Central Bank, and for that bank, \$5,000. The witnesses had testified that it was

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paid as a compensation to the Central Bank, for the services of the latter in making clearances through the Clearing-House for the plaintiff. The main witness for the plaintiff was its former president. He testified, in answer to questions put by the counsel for the plaintiff, that the money was paid as compensation, under an arrangement made between the banks. He testified, of his own knowledge, to what it was paid for, although he had had no knowledge of the arrangement at the time it was made. The terms on which the Central Bank was to act at the Clearing-House for the plaintiff had been settled by a former president of the bank. Upon its being assumed that the witness was hostile to the plaintiff, there was given the privileges of a cross-examination. The actual examination was of a kind that is used to destroy the credibility of a witness. The witness having testified to a transaction that would not have made the defendant liable as to the \$5,000, he saying that it was paid as compensation to the defendant's bank, many questions were put to him, tending to show that he could not explain how the money could have been properly paid as compensation. He was pressed to let the jury know what the services were for which compensation was pretended to be made, and to show how and why it was that the services were not compensated fully by the terms of the arrangement, of which the witness had no knowledge, and which terms, it was assumed, were the whole of the understanding or agreement between the banks.

The burden of proof was upon the plaintiff to show, by credible witnesses, that the circumstances under which the \$5,000 were paid gave the plaintiff a right of action. The mere payment did not give a right of action to recover it back. If the cross-examination had successfully shown that the plaintiff's witness could not make his account consistent with an assumed, or even proved, state of facts, the account must go for

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nothing, as not shown by a credible witness. But it would be an injustice to a defendant to support an inference that, because the account given by the plaintiff's witness was not credible, therefore the transaction must have been of a kind that made the defendant responsible. I do not mean to say that the answers given by the witness were inconsistent, but only to determine the utmost effect of the testimony, after supposing that the cross-examination was successful.

The defendant, as a witness, testified that the money was paid to him for the Central Bank, on account of services rendered to the plaintiff. If his account was true, the plaintiff's bank was indebted to the Central Bank for services. No witness in the case proved that the arrangement between the banks was of such a nature, that the plaintiff was not indebted for services rendered in acting for plaintiff at the Clearing-House. I repeat, the burden of proof was on the plaintiff to show, at least, that the money was not due. The defendant put in evidence a resolution upon the minutes of the plaintiff's board of directors, in these words: "On motion, the president was authorized to pay W. A. Wheelock, president, \$5,000, on account of loan made to this bank, by the Central National Bank." The defendant swore that he did not know of the terms of the resolution before he received the \$5,000, and this was upon the trial assumed to be true. It is manifest that if he did not then know of the terms, they did not at all contradict his account of the transaction.

The testimony of the only other witness in the case is not of sufficient importance to the merits of this appeal to be stated, especially as he had no knowledge of the relations of the bank before 1869, and the alleged services were principally before that time.

Before the judge charged the jury there had been no intimation that the plaintiff abandoned any part of his complaint, or meant to claim a recovery upon any

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other ground than of some tort stated in it. He was not bound to make any declaration on that subject, unless required to, in response to some demand of defendants. No such demand was made. But silence, under these circumstances, leaves his claim as he had made it in the complaint, and had used it for the admission of evidence.

The judge charged "that it was not necessary, therefore, that the plaintiff should prove these allegations," referring to the combination and conspiracy stated in the complaint. "If it appear upon the complaint that there is enough to show that the defendant has obtained the funds of the plaintiff wrongfully and without consideration, the complaint will be sustained." And he further charged, that a party who obtains funds without consideration, with full knowledge of the circumstances under which they have been obtained—knowing where they came from, and that they have been paid over without consideration, becomes liable to answer for those funds, whether he has disposed of them or kept them." The defendants' counsel requested the court to charge "that there is no evidence whatever of any conspiracy, combination or collusion between defendant and any other person, to obtain or extort money from the plaintiff." To which *the* court answered: "As to that, I have sufficiently *s*oken about the question of conspiracy. I cannot *charge* this request."

I do not propose to pass upon any exceptions that were made in respect of the matters that have been stated, but have made the statement for the purpose of examining some exceptions that were taken to the admission of testimony.

When the former cashier of the plaintiff was on the stand as plaintiff's witness, the plaintiff asked this question, "Did you, on January 4, 1870, and on February 1, 1870, deliver to Mr. Callender \$3,000 at each

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date?" The person named was the Callender mentioned in the complaint as bank examiner. The witness answered that he did, upon the direction of the board of directors. A question was then put, "Show me any direction of the board of directors to pay that sum." A resolution was shown "that the bank pay Charles Callender \$6,000 for services rendered this bank, outside of his official duties." To another question, the witness answered, "the services varied—borrowing money for the bank, helping it through its troubles, going out of his official duty to keep the bank from going into the hands of a receiver." Several other questions were put on the same subject, one of them to show that Callender was bank examiner at the time.

In this way, the jury had before it an account of a great wrong on the part of Callender, given as evidence against the defendant, after the defendant had objected that it was not evidence at all against him, and was irrelevant to the issue.

It certainly was not evidence. Not a jot of evidence was given to connect the defendant with Callender's misconduct. As irrelevant testimony, it confused the jury in passing upon a case where great discrimination was called for. Given as evidence against the defendant, it tended to excite sympathy for one side, and animosity to the defendant. And this was the more likely to hurt the defendant as the complaint charged a conspiracy between the defendant and Callender, to obtain money wrongfully from the bank, although the conspiracy charged was of an entirely different character from the offense of Callender, and from first to last, no testimony tended to show that the defendant had conspired as stated in the complaint. And should the case be taken as one where the defendant had received the money wrongfully, so that he was liable for it, although the wrong was not the wrong stated in the complaint, the defendant would be grievously injured

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by the recital of such things as evidence against him.

The same injustice was likely to occur as to the \$500, although the testimony as to this gives rise to considerations different from those that regard the \$5,000. As to the \$500, the judge finally left it to the jury to say whether the testimony given by the defendant on this point, or that of plaintiff's witness, was true. The former testified that Poole, the former president of plaintiff's bank, brought the money, and subscribed the amount to the church, as if it were the personal property of Poole himself. Poole testified to what may be here deemed sufficient to show that defendant must have known that it was money belonging to plaintiff's bank. It was assumed on the trial, at least by the charge that to make the defendant liable for this \$500, it was necessary to show that when he received it he knew, or believed that it was the bank's money. In this conflict the evidence given as to Calender's misconduct might have turned the scales against the defendant, when the jury was weighing his testimony.

For these reasons I think there should be a new trial, but it is expedient to proceed to some questions based upon the form of the pleadings.

I think it is clear, that in a case where it appears that the agent of a bank, without authority, either because the authority has not been conferred by the bank as a fact, or because the bank has no power under its charter to confer such authority, pays away its money to an officer and agent of another bank for his bank, and such officer knows that there is no authority to pay the money, and that his bank has no right to take it, he is liable personally for the money, whether or not he has paid it over. This is the general rule. The arguments on this appeal did not discuss specifically what were the limitations, or exceptions. It would not,

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therefore, be satisfactory to decide in the present case what degree of knowledge or belief the agent receiving must have on the subject of the unauthorized payment to make him personally liable, or whether he would be liable if the money were paid to satisfy a claim made *bona fide*, although its character is such that in a case made between the principals it might turn out to be unfounded. Such considerations are the more important in respect of the \$5,000. For I take it to be clear that if the defendant knew that without authority \$500 of the plaintiff's bank had been given to him for a charity, he would be liable, even if he had parted with the money. I do not know that the learned counsel for the respondent maintains that there would be personal liability if the defendant did not know that it was the money of plaintiff.

A plaintiff has therefore the right to allege the special circumstances that create the liability, or allege that the defendant had and received money to the use of the plaintiff, and prove it by the special circumstances. If the special circumstances are alleged they must be proved, and no other special circumstances materially different can be proved to sustain the complaint.

In the present case there was an entire failure to prove the special circumstances alleged as conspiracy and threat, and intent to extort. The allegations are, "the said defendant, by the means aforesaid and the use of such threat, and without consideration therefor, and with intent to extort money from this plaintiff, did on, &c., obtain from this plaintiff the sum of \$5,000." It is claimed that the unproved allegations may be rejected as surplusage, and there is enough left to make an action. Admitting that such rejection is proper, but not deciding that it is, all that would be left is "that the defendant, without any consideration therefor, did obtain the money from the plaintiff."

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This states no cause of action. It does not state as a fact that the money was received by the defendant for the use of the plaintiff. It would be proved by showing that the defendant, as a bank officer, took money from the plaintiff to be deposited in the bank. In that case there is no consideration given by the bank or the officer acting for it, in the depositing or obtaining. Whatever may be the implications of law in respect of the facts existing, after the obtaining of a deposit, no consideration is necessarily given by the depository before and upon the "obtaining." Certain duties arise, but not such as are based upon the existence of a consideration at the time of parting with the money.

The same propositions apply to the allegations as to the obtaining the \$500.

On the other hand, I am of opinion that the phrase "and without any consideration therefor" is not severable from the other allegations of the complaint so as to allow it to stand as a substantive statement of the cause of action intended by the pleader. It is really descriptive of the transaction, more specifically described in the other allegations. The statement is, substantially, there was no consideration from the defendant connected with his threat and conspiracy and extortion. This is no notice that the plaintiff relies upon anything but the obtaining by threat, &c.

If this be the true construction of the complaint, the motion should have been granted to dismiss the complaint on the ground "that the complaint is not made out, and that no case whatever has been made against any one, upon the papers."

Judgment and order appealed from reversed, with costs to the appellant to abide the event of the action.

VAN VORST, J., concurred.

Statement of the Case.

**SAMUEL N. KINGSBURY AND OTHERS, PLAINTIFFS
AND RESPONDENTS, v. CHRISTOPHER H. GAR-
DEN, DEFENDANT AND APPELLANT.**

I. Malicious Prosecution.**1. PROBABLE CAUSE.**

(a) *Question of law.* Upon a given state of facts, the question as to whether there was probable cause is one of law, to be decided by the court.

1. Conflict of evidence as to the facts.

Such conflict must be disposed of by the jury, and therefore the cause must go to the jury under proper instructions from the court as to their duty to find probable cause, or want of probable cause, according as they may determine the facts.

(b) *Probable cause, what not sufficient in itself to establish.*

1. ADVICE OF COUNSEL.

Merely showing that counsel, after a full and fair statement to him of all the facts, advised the prosecution, *without showing* the further element that the party in *good faith*, acted on the advice, is insufficient of itself to show probable cause.

2. MALICE.

(a) *Question for the jury.*

1. Inference from want of probable cause.

1. Cannot be inferred solely from want of probable cause.

8. DETERMINATION OF PROSECUTION.

(a) *Discontinuance by consent.*

1. *Semble.* Not sufficient to support an action for malicious prosecution.

II. Trial, conduct of.**1. SUBMITTING A CASE TO THE JURY IN TWO ASPECTS, EFFECT OF.**

Where, under a complaint, a case may be submitted in several aspects, and is so submitted, a *verdict* for plaintiff will be *set aside if there are errors against defendant in the charge as to one of the aspects.**

* This should probably be taken with the following qualification: viz.: provided the conceded or undisputed or indisputable facts bearing on the case in the aspect as to which the errors were not com-

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Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

Appeal from a judgment and an order denying defendant's motion for a new trial on the judge's minutes.

The facts sufficiently appear in the opinion.

Wm. W. Goodrich, attorney, and of counsel, for appellant, among other things, urged :—I. The action, of which malicious prosecution is alleged, must have been determined in the plaintiff's favor. The naked fact of commencing action and failing to appear and prosecute, is not sufficient evidence of want of probable cause, to sustain the action (*Gorton v. De Angeles*, 6 *Wend.* 418; *Palmer v. Avery*, 41 *Barb.* 290; affirmed, 41 *N. Y. Index*, 619). Where it appeared that the prosecution complained of was dropped in consequence of a settlement between the parties, held, that no action for a malicious prosecution would lie (*McCormick v. Sisson*, 7 *Cow.* 715).

II. The plaintiffs failed to show a want of probable cause. 1. This question is a mixed question of law and fact. When the facts are ascertained, it is a question of law, and it is the duty of the court to pronounce the law arising from the facts, and not leave it to the discretion of a jury. Still, when the question of probable cause is submitted to a jury, who find for the plaintiff, and the testimony leaves the question of probable cause doubtful, there is good ground for reversal (*Roberts v. Bayles*, 1 *Sandf.* 49, note; *McCormick v. Sisson*, 7 *Cow.* 715; *Hall v. Suydam*, 6 *Barb.* 87). The defendants' counsel requested the court to charge, that if the jury believed that the defendants fully stated to counsel all the facts, and counsel advised the attachment, no want

mitted, do not necessarily, as matter of law, call in that aspect for the verdict that was rendered.

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of probable cause was shown, unless shown by other evidence, and that the plaintiff could not recover. The court refused thus to charge, and the defendants excepted. If a party lays the facts of his case fully and fairly before counsel, and acts in good faith upon the opinion given him by such counsel (however erroneous that opinion may be), it is sufficient evidence of a probable cause, and is a good defense to an action for a malicious prosecution (*Hall v. Suydam*, 6 *Barb.* 83; *Stewart v. Sonneborn*, United States Supreme Court, 19 *Alb. L. J.* 89; *Ravenga v. Mackintosh*, *Barn. & Cres.* 691; *Laird v. Taylor*, 66 *Barb.* 139). The question of probable cause does not turn on the actual guilt or innocence of the accused, but upon the belief of the prosecutor concerning such guilt or innocence (*Hall v. Suydam*, *ante*; *Fostray v. Ferguson*, 2 *Den.* 619; 2 *Phil. Evidence*, 253; *Miller v. Milligan*, 48 *Barb.* 30).

III. The proof of malice is as essential as that of the want of probable cause, and this is a question of fact for the jury. The learned judge withdrew the question of malice by charging the jury that the plaintiff had established malice. The evidence as to malice was at least contradictory, and the withdrawal of this question from the jury was manifest error (*Vanderbilt v. Mathis*, *ante*; *Laird v. Taylor*, 66 *Barb.* 139).

IV. An examination of the complaint will show that the plaintiffs sued, first, for damages occasioned by a malicious prosecution in procuring the issuing of a warrant of attachment upon a debt which the plaintiffs claimed was not then due, and secondly, on a claim that the defendants unlawfully took from the possession of the plaintiffs a large quantity of goods (being, in fact, the same goods which were seized by the sheriff under the warrant of attachment), and converted them to their own use. These two causes of action cannot be united in one complaint. At the close of the plaintiffs' case, and also again at the close of the defendants'

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case, defendants' counsel moved to dismiss the complaint, on the ground that the proof showed no conversion. The action of conversion will not lie when the goods are returned to the possession of the plaintiffs; and the proof shows that the plaintiffs filed a petition in bankruptcy on February 5, 1877; that they afterwards made a composition with their creditors at thirty cents on the dollar; and also that the sheriff was discharged from the custody of the property on February 27, 1877. In other words, the property had been returned to the possession of the plaintiffs. Conversion does not lie under such circumstances, and the court should have granted the motion to dismiss the second cause of action. The importance of this refusal will be evident from the fact that, under the charge of the court, the damages arising from malicious prosecution, and the damages for injury to the goods, are inextricably confused, so that the jury rendered their verdict for a round sum covering damages partly real and partly fanciful, partly growing out of the malicious prosecution and partly out of supposed damage to the goods.

V. It was claimed by the respondents at the trial that the appellants had ratified the term of credit expressed in the notes, by recovering a judgment thereon, and that this was conclusive against them upon their allegation that the respondents had been guilty of fraud, in obtaining a term of credit upon the note. The answer to this is three-fold: *First*. The fact of a subsequent suit on the notes does not affect the question of interest at the time when the appellants commenced their action. Many things might have occurred meanwhile to render it proper to sue on the notes; the question is, what was the intent of the appellants at that time?—was their prosecution malicious, or simply a prosecution commenced in good faith, under advice of counsel? *Second*. There is no

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evidence before the court that any such judgment was obtained. *Third*. If there be any such evidence, or if it be conceded that such judgment was obtained against Daniel H. Lawrence upon such notes, that judgment is an adjudication that the capital stock subscribed by the special partners was not fully paid in, and that thereby Daniel H. Lawrence had been made liable as a general partner; the result of which adjudication is, that the partnership was based on perjury and was fraudulently formed, and this is *res adjudicata* in the present litigation. Mr. Gardner was asked the question whether he would have sold goods to the respondents, if he had known the manner in which that capital was paid into the concern, the answer to the same being excluded under the objection and exception of the respondent's counsel.

B. T. Ludington, attorney, and *Geo. W. Lord*, of counsel, for respondent, urged:—I. The cause of action for trespass in seizing the plaintiff's goods, and the conversion thereof by the defendants, was fully sustained by the law and the evidence. (a) A party who seizes property under an attachment which is subsequently set aside and vacated by an order of the court, is a trespasser *ab initio*. This was decided by the general term of this court, and that decision was affirmed by the court of appeals (*Wehle v. Butler*, 12 *Abb. Pr. N. S.* 139; *S. C.*, 61 *N. Y.* 245). The evidence upon the trial showed that one object of the defendants in procuring the attachment was to obtain documentary evidence upon which Mr. Lawrence, the special partner, could be made liable as a general partner of Kingsbury, Abbott & Hulett. This fact alone would have justified the jury in rendering a verdict of \$5,000, however slight the actual damage.

II. The cause of action for an abuse of process of law was also fully sustained. (a) It is well settled,

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that a party who procures an attachment by concealing facts, which, if disclosed to the court, would have prevented his obtaining the attachment, is guilty of an abuse of the process of the law (*Moulton v. Beecher*, 1 *Abb. New Cas.* 193; *Cooper v. Lewis*, 2 *Phil.* 178; Reported in *Daily Law Reg.*, July 6, 1878). (b) If the defendants had disclosed to the court, in their affidavit on which the attachment was obtained, that the goods in question had been purchased on a credit of six months, and that the notes given in payment therefor had never been returned to the purchasers, it is clear that the attachments would never have been granted, because there was no debt then due.

(c) The retention of the notes, and the subsequent recovery of judgments thereon, was a clear ratification of the sale on six months' credit, and the procurement of an attachment before the term of credit had expired, without any allegation in the complaint or affidavit on which the attachment was obtained, of fraudulent representations or concealment, was a clear and manifest abuse of the process of the law. Especially so, when it was shown that the attachments were obtained partly to give the defendants an unjust preference over other creditors, and partly for the purpose of procuring evidence by which to charge Mr. Lawrence as a general partner, in an action which the defendants intended to bring against him upon the notes which had been given in payment of the goods. (d) The rule of damages in an action for an abuse of the process of the law, is the same as an action for a malicious trespass.

III. The fact, that other attachments subsequently came into the hands of the sheriff, is no defense to this action. The defendants were the "*causa causans*" of all the injuries which followed (*Tiffany v. Lord*, 65 *N. Y.* 310).

IV. The fact, that other attachments subsequently

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came into the hands of the sheriff, did not even go in mitigation of the damages (Same Case). (a) The attachments in favor of the creditors whose debts were due, did not come into the hands of the sheriff until several hours after the illegal attachments had been served. It was the seizure under the first illegal attachments of the defendants which ruined the credit of the plaintiffs, and which brought down upon them the other creditors. (b) Besides, Gardner, one of the defendants, with full knowledge that plaintiff had made arrangements to procure additional capital, advised the other creditors to sue. He took their claims and placed them in the hands of the attorney of Gardner & Co., who had never acted as attorney for any of the creditors before, except Gardner & Co. So Gardner & Co. were virtually the actors and wrongdoers in all the proceedings. A party cannot cover up his wrongful act by procuring other creditors to act, after he has set the injury afoot by an illegal use of the process of the court (Cases before cited). (c) Besides, it was a matter of no consequence what was the amount of actual damage sustained by the levy of the defendants' attachment, so long as the jury were authorized to find that the acts of the defendants were malicious.

V. In view of the foregoing points, it is hardly worth while to examine the evidence, to see whether it supported the cause of action for a malicious prosecution, technically so-called. (a) If the cause of action for trespass and conversion, or for abuse of the process of the law was made out, then a new trial should be refused, whether the cause of action for a technical "malicious prosecution" was established or not. (b) But the evidence did sustain the latter cause of action. The attachment suits were ended, and the attachment was set aside before this action was commenced (Moulton v. Beecher, before cited).

VI. The question of "probable cause" was one of

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law for the court, there being no dispute about the facts. And the counsel for the defendants, in his motion to dismiss the complaint, rested his motion upon the ground that the question of probable cause was one of law, as to what must be shown to establish cause (*Sheriff v. Loucks*, 58 *Barb.* 426; 56 *N. Y.* 451).

VII. The defendants, having retained the notes given in payment of the goods, had no probable cause for getting an attachment for a debt not then due, by the concealment of that material fact (*Hammond v. Pennock*, 61 *N. Y.* 145; *Kennedy v. Thorp*, 51 *Id.* 174).

VIII. There being no dispute about the fact that the defendants had retained the notes, and had also recovered judgment upon them, it followed, as a necessary consequence, that they had ratified, as a matter of law, the contract of sale. Hence, all the evidence offered by the defendants on the trial, to show that the plaintiffs were insolvent at the time of the purchase of the goods, was properly excluded by the court. Knowledge of insolvency and concealment is not a fraud in law (*Chaffer v. Fost*, 2 *Lans.* 87; *Nichols v. Pinmer*, 18 *N. Y.* 295; 20 *Id.* 293). The fact that judgments had been recovered by the defendants on the identical note, was assumed throughout the trial.

By THE COURT.—VAN VORST, J.—The learned judge before whom the action was tried, in the opening portion of his charge to the jury, stated that the action for malicious prosecution could not be maintained, unless there was some proof of malice. He afterwards stated that “questions of malice and probable cause are questions of law for the decision of the court, and are not questions of fact for the jury, unless there is some conflict of evidence.

The defendants’ counsel, among other requests, submitted to the court, asked the judge to charge

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"that if the jury believe that the defendants fully stated to counsel all the facts, and counsel advised the attachment, there is no want of probable cause shown, unless it is shown by other evidence, and the plaintiffs cannot recover." The court declined so to charge.

The defendants' counsel also asked the court to decide "whether there was or was not, probable cause." To which the court replied: "I have decided that you had no probable cause."

The counsel also asked the court to charge "that the plaintiffs have not shown malice on the part of the defendants." The judge in answer said: "I have disposed of that by saying that they have shown malice." To each of these rulings the counsel for the defendant excepted, as he did to the portion of the charge in which it was stated "that malice is a question of law for the court."

In an action for malicious prosecution, it is incumbent on the plaintiff to prove that the prosecution, of which complaint is made, was instituted without probable cause, and maliciously (*Fagnan v. Knox*, 66 *N. Y.* 525). The question of probable cause is composed of both law and fact. "It being the province of the jury to determine whether the circumstances alleged are true or not, and of the court to determine whether they amount to probable cause" (*Besson v. Southard*, 10 *N. Y.* 239). And if there be a conflict in the evidence as to the facts which are claimed to constitute probable cause, the question should be passed upon by the jury, under instructions from the judge. If there is no dispute about the facts, it is the duty of the court to decide the question of probable cause (*Masten v. Deyo*, 2 *Wend.* 424).

I do not think that there was any substantial conflict in the evidence, with respect to whether the defendants had probable cause for their proceedings by action and attachment. And it was therefore the duty of the

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judge to determine, as matter of law, whether such facts and circumstances constituted probable cause. No substantial error is discovered in the rulings and decisions of the judge upon that subject.

The request of the learned counsel for the defendant, "that if the jury believe that the defendants fully stated to counsel all the facts, and counsel advised the attachment, then there is no want of probable cause, unless," &c., &c., to be effective, did not go far enough. For although a party lays the facts of his case fully and fairly before counsel, and acts upon the opinion given, that of itself is not proof of probable cause. It must also appear that he acted in good faith upon the opinion given. And the question of good faith is for the jury, and not for the court (*Hall v. Snyder*, 6 *Barb.* 83, 88). It is only when he acts in good faith, that the opinion of the counsel will shield him. And that must be affirmatively shown by the party, in the event that the advice proves erroneous.

The learned judge, however, fell into an error with respect to the subject of malice. In order to a recovery in actions of this nature, the plaintiff must establish that the prosecution complained of was conceived and conducted in malice. Malice must be combined with want of probable cause (*Goodman v. Stroheim*, 36 *Super. Ct.* [*J. & S.*] 216. "The question of malice in this action is for the jury" (*Besson v. Southard*, *supra*; *Vanderbilt v. Mathis*, 5 *Duer*, 304). For, although there was no justifying probable cause, yet, upon the whole evidence, it is for the jury to determine whether the defendant was moved by malice.

The judge was in error, therefore, when he stated that malice was a question of law for the decision of the court, and when, in regard to the defendants' request on that subject, he stated to the jury "that he had disposed of that by saying that they have shown malice."

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Even though the jury may have considered the subject of malice and determined it, yet the rulings of the learned judge must, of necessity, have prejudiced the plaintiff's case.

The plaintiff's counsel, however, urges that one of his causes of action was for trespass, and wrongful conversion of the plaintiff's property, to which the strict rules in relation to actions for malicious prosecution do not apply. But the action was tried as one for malicious prosecution. The defendants' counsel sought, at the commencement of the trial, to compel an election by the plaintiff's counsel between his causes of action for conversion and malicious prosecution. The application was denied, and the case went to the jury under both aspects.

Other grounds of exception were urged by the defendants' counsel on the argument of the appeal, but it is not necessary to formally consider or pass upon them, in view of the errors to which allusion is above made. The objection, however, that it does not appear that the prosecution complained of had been determined in the plaintiff's favor, appears to be serious.

It would seem that the action was discontinued, as the order recites, by "consent." It is doubtful whether such a termination, if that is all there is of it, is sufficient to justify an action for malicious prosecution. But we will not, as it is not necessary, pass absolutely upon that question.

Judgment and order reserved, and new trial granted, with costs to the appellants to abide the event.

SEDGWICK, J., concurred.

Opinion of the Court, by VAN VORST, J.

PATRICK MAGINN, ET AL., PLAINTIFFS AND RESPONDANTS, v. DANIEL H. LAWRENCE, ET AL., DEFENDANTS AND APPELLANTS.

LIMITED PARTNERSHIP; FAILURE OF SPECIAL PARTNERS TO CONTRIBUTE THE CAPITAL, ON THEIR PART, AS SET FORTH IN THE PARTNERSHIP AGREEMENT, AND THE CERTIFICATE FILED IN PURSUANCE OF THE STATUTE.

The capital furnished by special partners must be cash. Their uncertified checks upon a bank, in which, at the date of the checks, they have not money sufficient to meet and pay their checks, cannot be deemed cash, although, before the checks were presented, they had arranged or provided funds to pay the same, and they were paid.

Any false statement in the certificate or affidavit filed, makes all the persons interested in said partnership liable, as general partners (1 R. S. 765, § 8; Madison Co. Bank v. Gould, 3 Hill, 309).

It clearly appearing in this case that the affidavit of one of the general partners, filed with certificate, was false, in regard to the statement that each of the special partners had paid in \$20,000 cash, the parties to the partnership were all held liable as general partners.

Before VAN VORST and SEDGWICK, JJ.

Decided April 7, 1879.

Appeal from judgment entered in favor of respondent and others against Daniel H. Lawrence.

The action, though in form brought upon a promissory note, was in fact an action to charge Daniel H. Lawrence as a *general partner* in the firm of Kingsbury, Abbott & Hulett.

George W. Lord, for appellants.

W. W. Goodrich, for respondents.

By THE COURT.—VAN VORST, J.—The defendants

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in this action, who were members of a limited partnership, are sought to be held liable for its engagements, as general partners. Such liability is claimed to have arisen through a failure on the part of the defendants, Daniel H. Lawrence and John A. Kingsbury, the special partners, to comply with the provisions of the statutes in respect to their contribution of capital, in pursuance of the certificate signed by the parties, and on account of the falsity of the certificate and affidavit made, in relation to the contribution of capital by such special partners.

The statute provides "that if any false statement be made in such certificate, or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners" (1 R. S. 765, § 8; Madison County Bank v. Gould, 5 Hill, 309).

The partnership, which, according to the terms of the certificate filed, was to go into existence on January 2, 1874, was composed of the two persons above-named as special partners; the other defendants were the general partners.

By the terms of the partnership agreement, the special partners were each to contribute in cash \$20,000, and the general partners together \$10,000. The style of the firm was "Kingsbury, Abbott & Hulett."

The certificate states that each special partner "*contributes*" to the common stock \$20,000 "in cash." It is dated January 2. On the same day, an affidavit, required by the statute, was made by one of the general partners, in which it is stated that the sum specified in the certificate to have been contributed by each special partner had been "actually and in good faith paid in cash."

The principal question to be determined is, did the certificate or affidavit contain any false statements?

On January 2, the special partners each delivered to the concern a check on a bank for the sum of \$20,000.

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On that day neither of the special partners had to his credit in the bank on which his check was drawn, \$20,000. The defendant Lawrence had to his credit, on that day, in his bank, \$11,440.56, and no more. But on January 3 he deposited in the bank, on which his check was drawn, \$12,730.87. This sum was made up by a deposit of his own check on another bank for \$5,000, and the check of Kingsbury, Abbott, Gay & Co., for \$7,730.87. This last check had been delivered to him in part payment of a debt in his favor, against the firm of Kingsbury, Abbott, Gay & Co. In this connection it should be stated that the property and assets of Kingsbury, Abbott, Gay & Co., which firm was dissolved, had been purchased, and its debts assumed by the new firm of Kingsbury, Abbott & Hulett. These deposits made by Lawrence on January 3, made provision for his check drawn and delivered on the day previous, for \$20,000, and which was presented and paid on the fifth of the month.

With respect to the other special partner, John A. Kingsbury, on January 2, the date of his check, he had on deposit in the bank on which it was drawn, only the sum of \$7,715.19. But on that day he borrowed of Kingsbury, Abbott, Gay & Co., the old firm, but whose assets belonged to the new firm, the sum of \$10,000, for which he gave his note, payable at a future day. For this loan of \$10,000 he received a check, which on the following day he deposited in his bank. This check, together with the proceeds of a note, discounted for him by the bank, and passed to his credit, increased his deposit to \$20,100.46, out of which his check for \$20,000 was, when presented afterwards, paid.

It was in this manner that the special partners increased the amount standing to their respective credits in the banks on which their checks were drawn, and provided for their payments when they should be pre-

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sented. And in this manner was their contribution of capital made.

From this statement, it would appear that the affidavit of the general partner, made on January 2, was not true. The special partners had not, when such affidavit was made, actually contributed in cash the sums specified in the certificate. They did not, in fact, on that day, have the cash on hand to contribute. It had yet to be provided, in part, at least.

The objection is not that the payments were made in checks. But the checks were not drawn against moneys to the credit of the drawers at the time they were received as cash by the partnership. Checks, against existing deposits to meet them, might be regarded as cash, as they could be instantly presented, and the moneys received. But whether these checks would ever be made good depended upon the success of efforts to be put forth in the future to collect or borrow money.

Uncertified checks, received in this manner, at most represent the engagement of the drawers that they will be made good when presented, and are subject to contingencies, which might defeat the best intentions of the drawers.

"The certificate and affidavit speak of the day of their date. They are not promissory, but state what has been done. Unless, therefore, the capital had on that day been actually paid in cash, the statements cannot be said to be true" (*Durant v. Abendroth*, 69 *N. Y.* 148, 152). "No engagement or security, however good, can be substituted even temporarily" (*Id.*) "Certainly the statute meant cash, which is money in hand, and not credits of the special partner, or other person, however available" (*Van Ingen v. Whitman*, 62 *N. Y.* 513, 520).

In no view was Kingsbury's contribution (and Law-

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rence's is also in this regard open to criticism) a compliance with the letter or spirit of the statute.

Ten thousand dollars of his contribution, he in effect borrowed from the firm, to meet his check.

The assets of the old firm belonged to the new. His loan depleted their assets to the extent of the sum he borrowed, in place of which he substituted his promise to pay in the future. *Lawrence v. Merrifield* (42 *Super. Ct.* 36), gives no support to such a transaction. We are of opinion that the judgment appealed from should be affirmed with costs.

SEDGWICK, J., concurred.

PETER W. GALLAUDET, PLAINTIFF AND RESPONDENT, v. WILLIAM G. STEINMETZ, DEFENDANT AND APPELLANT.

The decision of the judge made at trial term, upon the motion of a party for the postponement of the trial on account of the absence of a material witness, where an exception is taken, is a subject of review by the general term.

The party aggrieved may, upon a case made, containing his exception, move at special term for a new trial, or he may present the exception for review by appeal from the judgment.

In either case the affidavits used on the motion properly form a part of the case (*Gregg v. Howe*, 37 *Super. Ct.* 420).

Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

Appeal from order denying defendant's motion for re-settlement of case.

F. E. Dana, for appellant.

W. W. Niles, for respondent.

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BY THE COURT.—VAN VORST, J.—The practice in cases like that involved in this appeal, is settled, in this court. The decision made by the learned judge, upon the motion of the defendant's counsel, before the impaneling of the jury, upon affidavits, for the postponement of the trial on the ground of the absence of a material witness, and to which decision an exception was taken, is the subject of review. The defendant may, upon a case containing his exceptions to the decision, move for a new trial at special term, or present the exceptions for review by appeal from the judgment. In either case the affidavits used on the motion probably form a part of the case (*Gregg v. Howe*, 37 *Super. Ct.* 420). The sufficiency of the affidavits cannot be determined on this appeal. The defendant's case should be re-settled by incorporating therein the affidavits used on the motion to postpone, and his exceptions. The order appealed from is reversed, with \$10 costs, and disbursements.

SEDGWICK, J., concurred.

DAVID H. DE LEON, PLAINTIFF AND RESPONDENT, v. MANUEL ECHEVERRIA, ET AL., DEFENDANTS AND APPELLANTS.

Exceptions to the judge's charge to the jury must be taken before the jury have rendered their verdict (*Code*, § 995).

It is not within the power of the judge presiding at the trial to allow exceptions to his charge, which were not taken before the verdict.

Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

Appeal from an order denying a motion to re settle a case on appeal, by inserting therein certain matters stricken out on the original settlement.

Opinion of the Court, by VAN VORST, J.

BY THE COURT.—VAN VORST, J.—Exceptions to the judge's charge to the jury must be taken before the jury have rendered their verdict. They must be reduced to writing at the time, or entered on the minutes (*Code*, § 995). As this is a matter of substance, to obviate errors in the trial, and in which the rights of the other side are materially concerned, it is not in the power of the judge to allow exceptions to the charge which have not been formally taken before the verdict. The affidavits show that the plaintiff's counsel knew of no such large liberty in respect to the taking of exceptions as is claimed by the defendant's counsel to have been extended by the judge at the close of his charge; that he never consented to the extension of such liberty.

As the exceptions were not taken at the time and in the manner provided by the Code, they could not afterwards be allowed, and the judge properly excluded them from the case.

It would seem, from all the facts before us, that when the judge who presided at the trial gave the defendants' counsel liberty to draw up his exceptions afterward, that the exceptions he had in mind were not the same as those intended by the defendants' counsel. We do not see how the misapprehension existing can be now corrected. Exceptions not taken in season, although intended to be, cannot afterwards be allowed, in opposition to the requirements of the Code, and to the manifest injury of the other side.

We cannot interfere with the amendments made to the case by the judge, as he is to determine what transpires before him, and may correct and settle the case according to what he determines to be, from his memory, and the facts before him, the truth.

The order appealed from is affirmed.

SEDGWICK, J., concurred.

Statement of the Case.

LOUISA B. COOPER, ET AL., PLAINTIFFS, v. JAMES
PLATT, REUBEN SMITH, ET AL., DEFENDANTS.

ESTOPPEL, CREATED BY FORMER JUDGMENT.

By the judgment of the supreme court, in an action in which one Sarah Louisa Hudson was plaintiff, and Isabella Berrand and others were defendants, it was adjudged and decreed that one Mary J. Watson was at the time of her decease lawfully seized and possessed in fee of certain lands and premises described in the said judgment, and that said Isabella Berrand and one Robert Lotta were her heirs at law, and that said lands in question descended to them as such heirs, and it was further adjudged that said lands be sold, in pursuance of the statute, to pay the debts of said Mary J. Watson. Under an execution issued upon said judgment, the said lands were sold, and the title of the plaintiffs in this action was derived from said sale. *Held*, that this judgment, not having been appealed from, fixed and determined the rights and interests of Isabella Berrand in and to the lands described in the same. It was binding and conclusive upon Isabella Berrand, and all who claim through her (*Hudson v. Smith*, 39 *Super. Ct.* 452; *Cooper v. Smith*, 43 *Id.* 9).

If Mrs. Berrand had any other claim to the land in question than that of heir at law, she should have set it up in that action. Her claim to the land, interposed in that action, is inconsistent with an independent and hostile claim or title to the land to herself personally, which is pleaded in this action; and it must be held that the judgment determined her true rights and interest to the land in question.

Mrs. Berrand, and those who claim through or under her, are estopped by that judgment; as against those who claim title under or through it.

Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

Exceptions ordered to be heard at general term.
Verdict for plaintiffs.

Henry E. Talmadge, for appellants.

John Townshend, for respondents.

Opinion of the Court, by VAN VORST, J.

BY THE COURT.—VAN VORST, J.—By the judgment of the supreme court, in the action in which Sarah Louisa Hudson was plaintiff, and Isabella Berrand and others were defendants, it was adjudged that Mary J. Watson, at the time of her decease, was seized and possessed in fee of the premises in question, and that Robert Lotta and Isabella Berrand were her heirs at law, and that the lands in question descended to them as such heirs. and was directed to be sold, in pursuance of the statute, to pay the debts of the intestate, Mary J. Watson.

Through a sale, made under this judgment, the title of the plaintiffs is directly derived. This judgment, which determined and fixed her right to the land in question, from which no appeal was taken, and which has never been questioned, was, as has been decided by two general terms of this court, on previous appeals, binding and conclusive upon Isabella Berrand and all who claim through her (*Hudson v. Smith*, 39 *Super. Ct.* 452; *Cooper v. Smith*, 43 *Id.* 9).

If Mrs. Berrand had in truth any such other claim to the land, as is now interposed by the defendant Platt, who took from her, in virtue of any moneys paid by her to Yates, Porterfield and Wells, whether she paid such moneys for herself or her mother, she could and should have set up such claim in the action in the supreme court. The claim to the land interposed by her in that action, solely as the devisee of her mother, is inconsistent with an independent and hostile right in herself personally, through a payment made to or promise of Yates, Porterfield and Wells, as it is with the judgment, which must be held to determine her true right.

The silence of Mrs. Berrand at the time she should have spoken affords persuasive evidence that in making the payments to Yates, Porterfield and Wells, she had no idea that she succeeded to any rights in

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“that if the jury believe that the defendants fully stated to counsel all the facts, and counsel advised the attachment, there is no want of probable cause shown, unless it is shown by other evidence, and the plaintiffs cannot recover.” The court declined so to charge.

The defendants’ counsel also asked the court to decide “whether there was or was not, probable cause.” To which the court replied: “I have decided that you had no probable cause.”

The counsel also asked the court to charge “that the plaintiffs have not shown malice on the part of the defendants.” The judge in answer said: “I have disposed of that by saying that they have shown malice.” To each of these rulings the counsel for the defendant excepted, as he did to the portion of the charge in which it was stated “that malice is a question of law for the court.”

In an action for malicious prosecution, it is incumbent on the plaintiff to prove that the prosecution, of which complaint is made, was instituted without probable cause, and maliciously (*Fagnan v. Knox*, 66 *N. Y.* 525). The question of probable cause is composed of both law and fact. “It being the province of the jury to determine whether the circumstances alleged are true or not, and of the court to determine whether they amount to probable cause” (*Besson v. Southard*, 10 *N. Y.* 239). And if there be a conflict in the evidence as to the facts which are claimed to constitute probable cause, the question should be passed upon by the jury, under instructions from the judge. If there is no dispute about the facts, it is the duty of the court to decide the question of probable cause (*Masten v. Deyo*, 2 *Wend.* 424).

I do not think that there was any substantial conflict in the evidence, with respect to whether the defendants had probable cause for their proceedings by action and attachment. And it was therefore the duty of the

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judge to determine, as matter of law, whether such facts and circumstances constituted probable cause. No substantial error is discovered in the rulings and decisions of the judge upon that subject.

The request of the learned counsel for the defendant, "that if the jury believe that the defendants fully stated to counsel all the facts, and counsel advised the attachment, then there is no want of probable cause, unless," &c., &c., to be effective, did not go far enough. For although a party lays the facts of his case fully and fairly before counsel, and acts upon the opinion given, that of itself is not proof of probable cause. It must also appear that he acted in good faith upon the opinion given. And the question of good faith is for the jury, and not for the court (*Hall v. Suydam*, 6 *Barb.* 83, 88). It is only when he acts in good faith, that the opinion of the counsel will shield him. And that must be affirmatively shown by the party, in the event that the advice proves erroneous.

The learned judge, however, fell into an error with respect to the subject of malice. In order to a recovery in actions of this nature, the plaintiff must establish that the prosecution complained of was conceived and conducted in malice. Malice must be combined with want of probable cause (*Goodman v. Stroheim*, 36 *Super. Ct. [J. & S.]* 216. "The question of malice in this action is for the jury" (*Besson v. Southard*, *supra*; *Vanderbilt v. Mathis*, 5 *Duer*, 304). For, although there was no justifying probable cause, yet, upon the whole evidence, it is for the jury to determine whether the defendant was moved by malice.

The judge was in error, therefore, when he stated that malice was a question of law for the decision of the court, and when, in regard to the defendants' request on that subject, he stated to the jury "that he had disposed of that by saying that they have shown malice."

Opinion of the Court, by VAN VORST, J.

BY THE COURT.—VAN VORST, J.—This action was brought to recover the value of merchandise left by the plaintiff with the defendants, who are warehousemen, on storage.

The plaintiff, in his complaint, alleges a demand, and that the defendants have neglected and refused to comply therewith, and that they have converted the merchandise to their own use, or have so disposed of the same as that it is wholly lost to the plaintiff.

The defendants in their answer alleges that their warehouse was feloniously entered, and the merchandise stolen and carried away by some unknown person or persons, without any fault or negligence on their part.

If the goods in question were in this manner stolen and carried away from the defendants' possession the plaintiff could not recover (*Schmidt v. Blood*, 9 *Wend.* 268 ; *Platt v. Hibbard*, 7 *Cow.* 497).

The learned counsel for the plaintiff contends there is no satisfactory evidence that the goods were stolen, and that the default in delivering, or accounting for the goods, renders his claim for their value complete.

The felonious act of taking the goods from the warehouse is indeed not directly proven. But it is so clearly established by circumstances and conditions, as to leave no reasonable doubt but that the offense was committed. On October 23, 1872, the merchandise was contained in cases standing on the second floor of the defendants' warehouse, where they had been for some time previous.

On the evening of that day the warehouse, after being examined and searched in the accustomed manner, as to its safety, its windows and shutters being found secured, its doors were locked, and the premises were left for the night, from all that appeared in a condition of safety against burglary. On the morning of October 24 the cases were found opened, rifled of their

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contents. The sash of a window opening upon a narrow and dark alley-way, in the rear of the building, which was left closed the previous night, was found raised, the hook of an iron shutter which inclosed the window, was unfastened, although the iron bar which ran across it was substantially in its place. As there were no marks of violence on the outside of the shutter, and as the iron bar was neither broken nor wrenched, the presumption is that the window was raised and the shutter opened by some person within the building.

The night had been rainy. There were muddy tracks of foot-prints on the floor, near the cases, and leading to the window, and upon bags of nuts lying upon the floor, near the window, over which the felons must have passed during the removal of the goods, going out and in. These facts and conditions, with reasonable certainty, establish that the goods were stolen.

Crimes of this character, perpetrated during the night, have rarely any witnesses beyond those aiding the guilty perpetrators, and must needs be proved by facts and circumstances. And when these are found, which reasonably point and lead to the crime, its fact must be considered as established.

There is no evidence in the case to break the force of these facts and circumstances, or defeat the conclusion reached through them.

How entrance was obtained is not so clear. Upon examination of the buildings on the morning when the loss was first discovered, no means of access during the night was discovered besides the window; and the shutters exhibiting no signs of external force, the statement of one of the witnesses that a "sneak thief" must have gotten in during the previous day and concealed himself in the building, seems probable.

The conclusion being reached that the evidence

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justifies a finding that the goods were stolen, the defendants would be exempt from liability, unless the loss was occasioned by their negligence and want of care.

The manner in which the cause was tried seems to indicate that the parties attached no great importance as to the order of proof upon the subject of negligence, or as to upon whom the burden in the first instance rested. For the defendant's counsel, when they took the case, not only proved the felony by the facts and circumstances above related, but also went beyond that, and gave evidence tending to show the safe and secure manner in which their warehouses were constructed and maintained. They gave evidence of the manner in which it was kept and guarded, of the number of men employed, and their duties, of the manner in which access to the building could only be had, of the guard kept over entrances, and of the searching the building in the evening, and the securing of windows and doors. This evidence shows the care of the defendants, and tends to negative any presumption that the goods were lost through their negligence.

But afterwards, and when the defendants closed their case, the plaintiff introduced evidence tending to show the absence of such care, diligence and watchfulness in the conduct of the defendants' business, and over their warehouse, and the property committed to their care, as prudence required.

The burden of proving that the theft was owing to the defendants' negligence or want of care rested upon the plaintiff. Before he could recover, the jury must be satisfied that the loss was in that manner occasioned. Many reported cases have decided that the *onus* is upon the plaintiff to furnish such evidence.

The case of *Claffin v. Meyer*, in the court of appeals, not yet reported, but a manuscript opinion in

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which has been handed up with the papers, is exceedingly clear and emphatic on this subject, and is valuable as the latest expression of the court of appeals upon this interesting question.

HAND, J., who delivered the opinion of the court in that case, says, "The plaintiff must in all cases, suing for the loss of goods, allege negligence, and prove negligence. This burden is *never shifted* from him. If he prove the demand upon the warehouseman, and his refusal to deliver, these facts, unexplained, are treated by the court as *prima facie* evidence of negligence; but if either in the course of his proof or that of the defendant it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman." And this negligence or want of care, as the learned judge above clearly stated, and as is afterwards reiterated by him, the plaintiff must show.

The charge of the learned judge, before whom the trial in the case under consideration was had, in the end, expresses this as his view of the law. For he said to the jury, "If you believe the defendants have answered the non-delivery, then the *onus* is thrown upon the plaintiff to show that the defendants have not taken this care, and it is incumbent upon him to point out in some particular how the defendants have not done so."

Whether, therefore, the plaintiff had shown such negligence or the want of such care as prudent men take under similar circumstances and conditions, was under the evidence, submitted to and has been decided by the jury. The counsel for the defendants holding that no such evidence of negligence or want of care on the defendant's part had been adduced, asked the judge to direct a verdict for the defendants, which was refused, and an exception was taken.

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There was a conflict in the evidence upon this subject, and the ruling of the judge was unquestionably correct. From the condition of the evidence the judge would not have been justified in taking the case from the jury, under the opinion of the general term, which set aside the direction of the judge, on the previous trial. It cannot be said that there was not sufficient evidence on this subject for the consideration of the jury. HAND, J., in *Claffin v. Meyer*, *supra*, quotes with approval the language of MAULE, J. (13 C. B. 916), as indicating the condition of a case which should not be submitted to a jury: "When we say that there is no evidence to go to a jury, we do not mean literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established."

That, under the evidence, is not this case. It is quite true that the defendants had given evidence, at considerable length, with regard to the safe character of their warehouses, and as to the manner in which they were managed, as to the number of men employed, and their duties. How the entrances were watched, and how the buildings were searched, the evening previous to the robbery, and as to how the windows were examined and the entrances secured. And looking at the case as the defendants left it with their proof, one could see no reasonable ground of complaint.

But there was evidence introduced by the plaintiff in the direction of showing that the number of men employed were not sufficient for the discharge of their duties, and for the maintenance of a proper watch and guard over the entrance of the defendants' warehouses during the day. That at times the doors were unguarded, and facilities for entrance unobserved was afforded. That persons had entered on several occasions, without being seen, or seeing any person on guard at the en-

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trances, and had gone up to the second floor before meeting an employee; that a door in the rear of the building, opening on the narrow and unfrequented alleyway, was not, in fact, as defendants claimed, always kept locked or properly guarded. That it was on several occasions found unsecured, and that through it access could readily and without observation have been had by a thief, on the watch for an opportunity to enter, and conceal himself. That the search accustomed to be made, and made the night of the robbery, was insufficient. The evidence also showed that no private night watch outside the building was maintained, although it appeared that many merchants and warehousemen do keep such watchmen. I am not certain that the judge could say that, in law, none of these facts afforded any evidence of the want of that care in the management of the defendant's business which ordinary prudence required, and which their relation to the persons who had stored their property with them for safe keeping, enjoined.

It was for the jury to determine, and not the judge, whether, under the evidence, the defendants exercised and maintained that care and diligence, with respect to their engagements and duties as warehousemen, as men of prudence would exercise, and whether the loss was occasioned by negligence or want of care (*Schwerin v. McKie*, 51 N. Y. 180).

Upon consideration of the defendants' exceptions we find nothing upon which we would be justified in disturbing the verdict of the jury or the result reached.

As it was a case for the jury, it went to them under a charge from the court, so clear, express and considerate, that there was no room to doubt that unless negligence was shown, through which the loss occurred, the verdict would have been given for the defendants.

The charge of the learned judge amply guarded the

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defendants' rights, and the jury's attention was distinctly called, and firmly held, to the sole ground upon which a verdict for the plaintiff could rest.

The judgment and order is affirmed, with costs.

SEDGWICK, J., concurred.

ISIDOR ARNOLD, PLAINTIFF, v. RICHARD S.
CLARK, DEFENDANT.

LANDLORD AND TENANT.

An agreement to repair in no way contemplates, as damages for a breach of the same, such as might result from destruction to life, or injuries to the person or property, that might result from the omission to repair, as provided in the agreement.

A landlord is not liable to his tenant *as in tort*, for his refusal or neglect to repair the premises as provided in his agreement to repair, &c.

Before VAN VORST and SPEIB, JJ.

Decided April 7, 1879.

This case comes up on exceptions ordered to be heard, in the first instance, at general term, the court having at the trial dismissed the complaint.

The action was brought against the defendant as landlord of a store in New York, an upper loft of which the plaintiff had hired for a year, the rent payable monthly from May, 1872, to recover damages for his having fallen upon the floor in December, 1872, several months after he had gone into possession.

Hewett & Newell, attorneys for plaintiffs; *William Wirt Hewett*, of counsel.

Opinion of the Court, by SPEIR, J.

David Thurston, attorney for defendants ; *Stephen P. Nash*, of counsel.

BY THE COURT.—SPEIR, J.—The representations alleged to be false were made by defendant's agent with intent to deceive and defraud the plaintiff, and that the loft hired by him was tenantable and suitable for his business, and that no oil had ever been stored in it, and that it had been used only for light mechanical work. Before the plaintiff went into possession under the lease, he had access to the premises during April for alterations, and expended several hundred dollars in partitions and fitting up the premises. About the first of May the plaintiff received a consignment of tobacco, and one of his men called Hangan, in moving the cases, slipped on the floor, and the plaintiff complained to the defendant's agent, who suggested that the floor should be scrubbed. After this was done, he showed the agent the floor, and threatened to go out on account of its condition. The agent told him he should hold him to his lease, but added, "I will lay you a new floor, and you have to stay." Thereupon plaintiff paid his monthly rent each month, upon the renewed promises of the agent to lay a new floor, but the floor was not laid. This continued up to November following, when the plaintiff refused to pay further rent.

The accident occurred in the next December. The plaintiff, in trying to pull a case of tobacco from the wall into the room nearer the light, with a truckman's hook, slipped and struck his elbow, and his arm was permanently injured. Afterwards the plaintiff saw the defendant himself, and said to him "that this happened through the promise of his agent, promising me from time to time to lay a new floor and didn't do it. He said if he promised me a new floor he ought to lay

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it for me ; he was authorized by him to do all necessary repairs, and had plenty of money to do it with."

The testimony was wholly that of the plaintiff and his witnesses. There are no contradictions, and the proof is clear and ample to show that it was false. With the facts proven that the plaintiff made particular inquiry of the defendant's agent of the oil having been stored in the loft, and the repeated promises to lay a new floor, and that the value of the premises for his business was greatly lessened by reason of the storage of oil, if not wholly unfit for the plaintiff's business, it is difficult to believe that the agent did not intend to induce the plaintiff to believe the statement made to him, and that he did deceive the plaintiff until the tenancy was secured.

A motion was made to dismiss the complaint on two grounds. First, that the action was on contract, and there being no allegations in the complaint for any repairs it would be changing the cause of action to recover for personal injuries. Second, if the action is to be maintained as one of *tort* the plaintiff was guilty of contributory negligence.

The judge held that there could be no recovery on the part of the plaintiff if the cause of action set up in the complaint be held to be one of negligence, and he therefore dismissed the complaint so far as a recovery was sought on this ground. The court gave the plaintiff the option to treat the action for a breach of contract to repair, and that in that case, as no actual damage properly recoverable for such a breach had been shown, to direct a verdict for nominal damages.

The plaintiff decided to consider his action *ex delictu*. According to his own testimony he had before him the experience of his servant Hangar when he threatened to cancel his lease and go out. His own injury occurred after this by slipping on and using the same floor.

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After the actual experience of the dangerous condition of the floor this was contributory negligence on the part of the plaintiff.

Although the plaintiff relied upon the positive false representations of the defendant's agent that the premises were tenantable and suitable for his business, and that no oil had been stored therein, which, if so stored rendered the occupation injurious to his business or even uncomfortable, he would probably on this account have been justified in abandoning them as untenable. But he continued to occupy, complaining of their condition, and he must be deemed to have remained there on reliance upon the defendant's repeated promises to lay a new floor. When he discovered that these representations were false and that he had been deceived as to their condition, he could claim the right to abandon the premises and rescind the lease. In such case he would be entitled to recover the value of the improvements, if any, by him made, his expenses in moving, and possibly damages for loss of business, if any had been sustained. It was also optional for him to remain and put the premises in the condition the representation or agreement entitled him to have them in.

But he could not remain, after full knowledge of the deception practiced upon him, and of the unfit condition of the premises for his use, and still claim the right to rely upon the false representation as an item of damages, when, by his own subsequent acts, he had deprived himself of any such right. If the floor was in a dangerous condition for use he could not take the risk of continuing its use, and look to the landlord to indemnify him for any loss he might sustain in using it. The plaintiff, therefore, had the same right of action, and no greater, than he would have had when he made the lease, if no misrepresentations had been made and he had gone into possession relying on an agree-

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ment to repair. If there be no agreement to repair, the landlord is not answerable for the condition of the building. In order to create an obligation on the part of the landlord, to repair, in whole or in part, the premises demised, a positive stipulation, an express covenant or promise, is necessary to be proved. The duty which arises from the relation between landlord and tenant, or which can be implied from the nature of their contract, creates no obligation to repair. Even where the building is let for a special purpose, or its occupation for any other purpose is in terms prohibited, there is no implied contract or warranty on the part of the landlord that the tenement shall be or continue fit for the purpose for which alone it is demised (*Jaffe v. Harteau*, 56 *N. Y.* 398; *O'Brien v. Capwell*, 59 *Barb.* 497).

As to the damages for neglect to repair, the true rule of damages recoverable are only what the repairs would have cost if made by the tenant, or the loss of the use of the premises during the period required for the purpose of making such repairs, or the difference in value of the use of the premises as they are and as the lessor agreed to put them in. If the repairs are not made the damages would be merely nominal (*Darwin v. Potter*, 5 *Den.* 306; *Cook v. Soule*, 56 *N. Y.* 420; *Hexter v. Knox*, 7 *J. & S.* 109; 63 *N. Y.* 561).

The plaintiff claims that, under the circumstances, the defendant is liable for the accident, for the natural and proximate consequence of the breach of the covenant which creates a duty, and that the neglect to perform that duty is a ground of action in tort.

The argument, as I understand it, is that the parties knew there was an element of danger if the floor should remain in that condition, and that each contemplated that when the contract was made to lay a new floor; it was a special agreement; and that the injury

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sustained by the plaintiff was on account of the neglect of the defendant to lay the floor, and was proximate, not remote or consequential.

As before stated, unless there be an express agreement to repair, the landlord is not answerable for the condition of the building. Here there was no such agreement. The case rested upon the subsequent parol promise to lay the floor, after being notified of its defective condition. It is not founded on a new consideration, and can add nothing to the original obligation, and furnishes no ground for awarding additional damages.

Had there been an agreement of the landlord to repair, it could only have reference to the condition of the building or premises demised, for the purpose of the profitable use and the pecuniary benefit to be derived from the engagement, or loss from being deprived of their use in such state of repair as the agreement intended. The mere agreement to repair in no way contemplates any destruction of life, or injuries to the person or property of any one which might accidentally result from an omission to fulfill the agreement in every respect. The only case which holds a different doctrine is found in *Johnson v. Dixon* (1 *Daily Reg.* 178), which was overruled in the later case, in the same court, of *Flynn v. Hattan* (43 *How. Pr.* 333). I find no warrant in principle or authority for the proposition that a landlord, under a contract to keep the premises in repair, is for breach, is also further liable to his tenant as in tort for willful refusal or neglect to perform his obligation.

There must be judgment dismissing the complaint, with costs.

VAN VORST, J., concurred.

Statement of the Case.

THE INDIA RUBBER COMPANY, PLAINTIFF AND
RESPONDENT, v. THE RUBBER COMB AND
JEWELRY COMPANY, ET AL., DEFENDANTS
AND APPELLANTS.

FRAUDULENT SIMULATION OF LABELS.—INJUNCTION.

In this case the following facts appeared:

The labels used by defendants in their business were in undoubted imitation of those used by plaintiff, and the greater part of the details were so like the corresponding details of plaintiff's labels, that it was plainly defendants' intention to represent that the goods upon which the same were to be placed were made by plaintiff. *Held*, that the plaintiff was entitled to protection against this.

The manner in which defendants printed their name upon the labels in question was likely to draw attention, from the difference between it and plaintiff's name, and lead the ordinary reader to believe it to be plaintiff's name. *Held*, that in such case the intent being evident, the plaintiff is responsible for the effect produced, *though the name used was its proper corporate name*.

As to that part of the judgment herein against the use of portions of the labels, *the court held*: Whether a name can be a trademark or not, there is no doubt that a defendant may be enjoined from using a plaintiff's name. It was contended that plaintiff's name really expressed a kind of trade, and that, as the trade is open to all, there can be no exclusive right to words that intelligibly designate the same. But it appeared that there had been a purpose to use a name, in imitation of plaintiff's, on a label, and the case made it proper to consider whether there was not danger of a use of it apart from the same. No closeness of reasoning, based on the fact that it has never been used by itself, is called for in a case which discloses a meditated general wrong. Nor is it material that the name is described in the pleadings and findings as a trademark.

As to the use of the numbers "2, 101" and "82," the principles of *Gillott v. Esterbrook* (48 N. Y. 875) apply. In that case and this, the numbers were selected arbitrarily, and were used to distinguish one pattern or character of goods from another, and the plaintiff is entitled to protection in his use of the same.

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The court further held, as to the continuance of the injunction: Such an actual use, and danger or threat of further use, appeared, that the plaintiff, if otherwise entitled, would not be deprived of his remedy by injunction, though shortly before the service of summons, &c., the defendant had stopped using the labels in question.

So far as the right to an injunction is concerned, there is no need of proof that any one has been or is likely to be deceived by the simulated label. If a court cannot judge, from the resemblance, the effect likely to be produced, it certainly may infer, from a fraudulent intent in circumstances which would permit its consummation, that it is likely that the intent will be successful.

Before SEDGWICK and VAN VORST, JJ.

Decided May 16, 1879.

This is an appeal from an interlocutory judgment entered upon the decision of the special term of this court, perpetually enjoining the defendants from using any and all of the plaintiff's labels and trademarks set forth in the complaint, and ordering a reference to ascertain the amount of the plaintiff's damages sustained thereby.

The action was for an injunction against the defendants using plaintiff's labels and trademarks, and for damages.

Jacob & Koch, attorneys, and *Yeaman & Curtis*, of counsel, for appellants, urged:—I. The words "The India Rubber Comb Company," the only trademark claimed or described in the complaint, are not and cannot become or be made a trademark (*Browne on Tradem.* §§ 138, 161, 162, 164, 350, and cases cited). The complaint has not been amended, to claim that anything else enters into the composition of the trademark (see also *In re Simpson*, 10 *Off. Gaz. Pat.*). The numerals cannot of themselves be a trademark, such as 101, 2 and 32 (*Browne on Tradem.* §§ 225—

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233, 442. If the engraving or picture of plaintiff's factory may be used as a trademark, so may the engraving or picture of the defendant's factory, especially as they are so unlike as never to deceive or mislead. If the trademark claimed be valid, then the defendants have not used it. The plaintiffs use the words "India" and "N. Y.," the defendants do not. The defendants use the word "Jewelry," which the plaintiffs do not. The defendants use the monogram, while the plaintiffs do not. The plaintiff uses the words (expressing a fraud and falsehood) "Sole manufacturers of Goodyear's India Rubber and Gutta Percha Combs," which the defendants do not. The defendant company has the right to use its own corporate name, and has done so. The plaintiffs never had any trademark or property in the numerals 101, 2 and 32, as claimed. It was not the first or only one who used them, and if it ever acquired any such right, it has been abandoned to the public by acquiescence in their long use by other traders and manufacturers. Fifteen years' public, open and notorious use by others, is an insurmountable obstacle to the present assertion of exclusive right.

II. If a liberal construction of the complaint would make it a cause of action for fraudulent simulation of labels as distinguished from trademarks, what some writers call unfair and immoral competition (a case not claimed in the complaint), then the plaintiff cannot recover, for the reasons above expressed, especially the differences pointed out under figure 4 of Point I., and also for the following reasons: 1. No intent to defraud has been shown, which must be done to entitle plaintiff to injunction. 2. No actual or successful fraud or deceit has been shown by a single instance of sale of defendants' goods as and for plaintiff's, nor of any one calling for or ordering plaintiff's goods and getting defendants' instead, which is necessary to

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entitle plaintiff to judgment for damages or for an accounting. 3. No attempt was made to show either such fraudulent intent, or such actual fraudulent sales. 4. It has not been shown, nor has any attempt been made to show, that any ordinary purchaser looking at either the goods or the labels would mistake the defendants' for the plaintiff's. 5. Neither the plaintiff nor the defendants retail goods. They both sell to jobbers, who supply retail dealers, who supply consumers. They each sell at wholesale, in large, paper-wrapped packages, as exhibited in court, the plaintiff putting on these large packages a green label with black letters, and the defendant a white label with blue letters. Nothing could be more distinctly and even glaringly different. If any witness had come into court and said he had been deceived or could be deceived by mistaking one of these labels for the other, the court would simply not have believed him.

III. The case of *Gillott v. Esterbrook* (48 *N. Y.* 374), does not hold that numbers by themselves may be a trademark, but only that they can be used in connection with other things. The plaintiff's trademark is described as "The India Rubber Comb Co.," without numbers. When this was offered for registration at Washington, and rejected, as stated by plaintiff's counsel, the engraving of the factory was added, and it was then registered. The trademark and specifications as registered not claiming the right to the use of numbers 101, 2, 32, nor in any way alluding to them, is conclusive evidence that they had never been relied upon as a trademark, or, if so relied on, had been abandoned. The claim and sworn application state, "Our trademark" consists of the words "India Rubber Comb Company, arranged in connection with a representation of our factory at College Point, Long Island." The document further states that this trademark may be accompanied by a

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border, but proceeds to allege that the essential features are the words "India Rubber Comb Company, arranged in connection with a representation of the India Rubber Comb Company's factory at College Point, Long Island." Thus the numbers 101, 2 and 32 are expressly excluded in two ways; by stating what may accompany the trademark, and by stating the essential features of the trademark. They further say "This trademark we have used in our business for three years last past." The plaintiff cannot have two trademarks, nor dozens or hundreds of them, as it would have if each label with a different number on it be a different trademark. In its complaint it describes one without number, sues the defendant on that description, and to sustain the cause of action puts in evidence a certificate of registration making no claim to numbers as a part of its trademark, and containing a specimen label with numbers not mentioned in the complaint or the evidence, to wit, 1 doz.,—No. 4— $7\frac{1}{2}$ inch. The plaintiff must abide by its own description and registration. It cannot register one thing and claim another.

IV. There was an element, a finding of fact, in *Gillott v. Esterbrook*, that broadly distinguishes it from this case. The trial judge found, and the court of appeals expressly rely upon the finding, "that the said use by the defendants of said numerals 303, was with a knowledge by them of the rights of the plaintiff to the same, and with the intent to obtain for themselves the profits and advantages to which the plaintiff was exclusively entitled in the use of his said trademark, and to mislead the public, and to defraud the plaintiff in that respect." In this case we have not the knowledge by defendants, of plaintiff's rights, if it had any, and any such knowledge, as well as the right, is negatived by the long and general use by others. Neither have we the intent to obtain plaintiff's profits; nor the

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intent to mislead the public and defraud the plaintiff, all which are found in the case of Gillott ; and none of which are proved in this case.

V. Particular attention is called to the case of Singer Manufacturing Co. v. Wilson (2 *Ch. Div. App.* 434), a late English case, which perhaps, more nearly than any other case, contains the whole law of trademarks and fraudulent imitations of labels. The case of Boardman v. Meriden Britannia Co. (*Cox Tradem. Cas.* 490), is not similar in its facts. The case, like Gillott's No. 303, holds that a number can only be a part of a trademark in connection with other things. When any mark, symbol or device is used merely to indicate the name, quality, style, or size of an article, it cannot be protected as a trademark (see also *Coddington's Digest of Tradem.* 265).

VI. Although, by the long-continued use of certain letters, figures, words, marks or symbols, which do not of themselves and were not designed to indicate the origin or ownership of the goods to which they are attached, but only to designate the nature, kind, or quality of the different varieties of the article, and because so marked the goods have become known as those of the manufacturer who first used them, such fact cannot alter the original meaning of the words or symbols, or the intent with which they were first used as denoting the name of the thing or its general or relative quality, or take from others the right to employ them in the same sense (*Candee v. Deere*, 54 *Ill.* 439).

VII. There is no case to be found in which a plaintiff has been allowed to sell the same goods under more than one trademark. The idea of identity, oneness, is necessary to and so embraced in the conception of a trademark, as applicable to a certain kind or line of goods, that divisibility or plurality at once destroys both the conception and the thing. The same trader or manufacturer may have one trademark for his

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woolen goods, another for his cotton goods, another for his silk goods, and another for his combs, if he makes so many articles. But he cannot have three trademarks for the same comb. In this case the plaintiff has declared on one trademark, its corporate name: "The India Rubber Comb Company;" it has put in evidence eight, all differing in some respects from each other, and has recovered on five, three being always annexed to one article.

VIII. The motions to dismiss plaintiff's complaint, and again, at conclusion of plaintiff's testimony, should have been granted. And even if there had been any grounds for retaining the complaint as to the defendant company, the motion to dismiss as to the individual defendants, Sonneborn, Dittenhoefer and Cohn, should have been granted. There was no evidence whatever upon which to base a judgment against them. It is proved, and no attempt made to contradict it, that they were not in the business, individually or personally. That they were officers of the defendant, the Rubber Comb and Jewelry Company, can in no way make them personally responsible. If they had been manufacturers, on their own account, they could not be joined. It would be a case of alleged wrongs by different parties. Therefore the objection of improper joinder of parties should have been sustained, and all these three defendants should have had judgment for costs.

Abbett & Fuller, attorneys, and *Messrs. Fuller & Gilhooly*, of counsel, for respondent, urged:—I. The plaintiff's name, "The India Rubber Comb Company," used on or in connection with its manufactures, is a valid trademark, of which the plaintiff is entitled to the exclusive use (*Newby v. Oregon Central R. Co.*, 1 *Deady*, 609). In the matter of the India Rubber Comb Company (*Off. Gaz. Pat.*, November 30, 1875),

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the opinion of the commissioner contains a citation and discussion of the cases on this point, and he holds that said words constitute a valid trademark (see, also, *Colman v. Crump*, 70 *N. Y.* 578). This particular trademark, to wit: the words "The India Rubber Comb Company," has been sustained by the superior court in the case of *India Rubber Co. v. Meyer*.

II. The plaintiff is entitled to the exclusive use of the numbers "101" and "32," as applied to combs, and the number "2," as applied to hair-pins (see *Gillott v. Esterbrook*, 48 *N. Y.* 374, 377).

III. The plaintiff is entitled to the exclusive use of the cut or representation of a building, as shown in the exhibits annexed to the complaint, in connection with combs, and any simulation of such cut should be enjoined. Such a device is a good trademark (*Smith v. Reynolds*, 10 *Blatchf.* 100; *Kinney v. Basch* [unreported]; *Coddington Dig. Tradem.* 85; *Faber v. Hovey*, *Id.* 242; *Colman v. Crump*, 70 *N. Y.* 573).

IV. The defendants are joint *tort feasors*, and as such may be sued jointly. The defendant, Dittenhoeffer, is the president of the Rubber Comb and Jewelry Company; the defendant, Sonneborn, is secretary and treasurer; and the defendant, Cohn, is a salesman and corporator (see *Goodyear v. Phelps*, 3 *Blatchf.* 91; *Poppenhusen v. Falke*, 4 *Id.* 493).

V. "Where the imitation of plaintiff's trademark is close, and the manner in which defendants' articles are put up nearly resembles the plaintiff's, the law must presume it to have been resorted to for the purpose of inducing the public to believe the article is that of the plaintiff, whose trademark is imitated, and for the purpose of supplanting him in the good-will of his business (*Curtis v. Bryan*, 2 *Daly*, 312; *Taylor v. Carpenter*, 11 *Paige*, 292; *Brahan v. Bustard*, 9 *Law Times*, *N. S.* 199; *S. C.*, 2 *New R.* 572; *Amoskeag Manufg Co. v. Spear*, 2 *Sandf.* 599-608; *Edelsten v. Edelsten*,

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9 *Jur. N. S.* 479; *Colman v. Crump*, 70 *N. Y.* 573) And in order to entitle plaintiff to relief, it is not necessary that the imitation should be so close as to deceive persons seeing the two trademarks side by side (*Seixo v. Provezende*, *Law R.*, 1 *Ch.* 192). In a recent case in the house of lords (*Worthersspoon v. Currie*, 42 *Law J. R. N. S. Ch.* 130), Lord CHELMSFORD lays down the rule, that, to establish a case of infringement, it is sufficient if the resemblance is such as to be likely to make unwary purchasers suppose they are purchasing plaintiff's articles. See, also, in the case of *Blackwell v. Armistead* (5 *Amer. Law Times*, 85), decided in 1872.

VI. In the case of *Gillott v. Esterbrook* (48 *N. Y.* 374), the court of appeals held that the use and advertisement of a trademark by others for a period of fifteen years, where plaintiff had no knowledge of such practice, or acquiesced in the same, did not preclude the owner from enforcing his sole right. And in a suit to enjoin defendants from selling "Charter Oak" stoves bearing a certain trademark, the fact that parties in other localities manufactured "Charter Oak" stoves, and sent them into the market to compete with plaintiff's manufactures, in no way aids the defense, unless it appears that the plaintiff assented to or acquiesced in such infringement of his rights (Supreme Ct. of Mo., *Filley v. Fassett*, 44 *Mo.* 168). So, in the case of *Kinahan v. Bolton* (15 *Irish Ch.* 75), the lord chancellor held that in order to prove acquiescence by a firm in the piratical use of their trademark, knowledge of such use must be proved, and that is not accomplished by the proof of publication of advertisements, which could have been an invasion of the rights of the firm if those advertisements have been issued, not steadily or uniformly, but interchangeably with other advertisements in some respects similar, but not infringing the rights of the firm.

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VII. In the case of *Dale v. Smithson* (12 *Abb. Pr.* 237), the general term of the common pleas expressly hold that the plaintiff is entitled to protection in the exclusive use of his trademark, although it contains a fictitious name as the name of the manufacturers of the article, provided it does not misrepresent the quality and substance of the manufactured article, and it is not used with fraudulent intent. In the case of *Curtis v. Bryan* (36 *How. Pr.* 33) the general term of the common pleas held that false and exaggerated statements in advertisements of the manufactured article, not contained in the label sued on, do not deprive the owner of his right to protection in his exclusive use of his trademark.

VIII. The main inquiry in such cases is, are the ultimate customers deceived? (*Coats v. Holbrook*, 2 *Sandf. Ch.* 586; 3 *Barn. & Cress.* 541; 5 *Dowl. & R.* 292).

IX. A reference was properly ordered to ascertain the amount of damages sustained by the plaintiff (*Blackwell v. Armistead*, 5 *Amer. Law Times*, 85, decided in 1872; *Taylor v. Carpenter*, *Cox Amer. Tradem. Cases*, 32; *Blofield v. Payne*, 4 *Barn. & A.* 410; 3 *Mylne & Cr.* 338; *Bailey v. Taylor*, 1 *Russ. & M.* 73; *Whittington v. Wooler*, 2 *Swanst.* 428). See also a decision of the general term, supreme court, first department, Dec. 30, 1875, in the case of *Faber v. Hovey* [unreported], *Coddington Dig. Tradem.* 242).

X. The well-known case of *Boardman v. Meriden Britannia Co.* (35 *Conn.* 402, and *Cox Amer. Tradem. Cas.* 490) resembles in almost every particular the one at bar.

BY THE COURT.—SEDGWICK, J.—The answer of the defendant corporation admits that it is, and since its organization, has been, engaged in the sale of combs and hairpins, “and that it has affixed thereto labels similar to those shown in plaintiff’s Exhibit A 1, and

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used Exhibits B 1, C 1 and D 1, for only a short time, and but few of them; but denies that the same were fraudulent imitations of plaintiff's labels." This answer was sworn to December 14, 1877. The corporation defendant was incorporated January 16, 1877. The testimony bearing on the time through which the defendant used the labels, and the admissions of the answer, sufficiently showed such an actual use, and danger or threat of further use, that the plaintiff, if otherwise entitled, would not be deprived of his remedy by injunction, even if the court were satisfied that shortly before the service of summons the defendant had stopped using them.

The labels, Exhibits C 1 and D 1, seem to have been those not used by the defendant corporation. The defendant Sonneborn, in his answer, alleges that these labels were devised and used before, but not after, the incorporation of defendant. His evidence did not clearly show that these labels had not been used after the incorporation, and on the whole case it appeared that the admission of the answer of the defendant corporation was correct. These labels were in undoubted and designed imitation of plaintiff's labels, Exhibits C and D. The defendants used as their name, which it was not, the words, "The India Rubber Comb and Jewelry Co.," and the greatest part of the other details were so nearly like the corresponding details of plaintiffs' labels that there could be no doubt that defendant's intention was to represent by their labels that the goods on which they were to be in some fashion placed were goods made by the plaintiff, and in the nature of things it was likely that the intention would be successfully carried out.

With these facts in their minds the defendants proceeded to devise or use for combs the labels, Exhibit A 1, and Exhibit B 1, and made as much of an imitation as the first, excepting the word "India" is left out.

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The right to use their name, as changed into "The Rubber Comb and Jewelry Co.," is maintained, on the ground that the defendant, having been incorporated by the latter name, there was a clear legal right to use it upon their goods. Without adverting to an important consideration that they, under the statutes of this State, took and composed that name according to their pleasure, with perhaps a view to the future, which may lead to different rights to those that refer to a name involuntarily bestowed upon a natural person, it is certain that there is some limitation of the use of a lawful name. If a right name is used intentionally in a manner that draws attention from a difference between it and another name, so that the effect produced is that of the other name, there is a responsibility for the effect. It is, as to the effect, not the use of the right name. In the present case the way in which the defendants printed their name: "The Rubber Comb and Jewelry Co.," viz., upon pieces of paper like those used by the plaintiff, in ink of a like color, and at the top of several colorable imitations of a picture of factory, of description of goods, and of the words, "warranted not to warp or split, and can be cleaned in warm water," was likely to draw the attention from the difference of name, and to lead the ordinary reader not to perceive it, but to think that it was plaintiff's name. The labels themselves, and the testimony in the case, keeping in mind that the labels were made shortly after what was beyond doubt an intentional imitation, prove that the use of defendant's name on the later ones was intended to produce an impression that it was the plaintiff's name. A little fact is very significant to show that the defendants had in mind the character of plaintiff's labels when they made theirs. On plaintiff's labels was "warranted not to warp or split, and can be cleaned in warm water." The defendants, on their first labels, copied this in its very words. On their

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later, they placed, "warranted not to warp or split, and can be cleaned in hot water." It would seem as if the change of "warm" to "hot" was a preparation of evidence.

In such case it is so easy to give a distinguishing mark that shall have no doubt about it, that it can almost be said that merely the failure to do it shows an actual purpose not to do it. The sum of this part of the case is, that the plaintiff proved that the labels of defendant, when placed upon goods, were a representation that the goods were the manufacture of plaintiff. The law gives protection against this.

Here may be noticed the allegation that plaintiffs had abandoned any exclusive right they may have had by acquiescing in the use of this kind of labels by others, for years. The facts did not sustain the allegation. If there were proof (which was not clear) that there was such a use by others, there was no proof of acquiescence by plaintiffs in it.

As to the sale of goods by the plaintiffs, under the name of the United States Company, the defendants' requests to the court do not claim that the labels or marks in question were used. I cannot ascertain from the evidence that the defendants attempted to prove it.

Another allegation is that the label of plaintiff should not be protected, because it had on its face the words "Sole manufacturers of Goodyear's India Rubber and Gutta Percha Combs," and that this was false and fraudulent to purchasers. Whether it was or was not false was a question of fact. The court could not take judicial cognizance of what Goodyear's India Rubber and Gutta Percha Combs were. It was possible that a party should be the only manufacturer of such combs, and that at least a claim to be so was not fraudulent. The burden was upon defendant to show the falsity and fraudulent intent, but no testimony as to them was given.

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It is also claimed that there was no proof that any one in the market had been, or, by an expert, that any one was likely to be deceived into the belief that goods having defendants' labels were made by plaintiff. So far as a right to a preventive remedy by injunction is concerned, I do not think that such proof was necessary.

If a court could not judge from a resemblance that it was likely to produce the effect that the original or true one would produce, and which, I think, it can, certainly it may infer from a fraudulent intent of a person in circumstances which would permit the consummation of it, that it is likely that the intent will be successful, and others will be deceived.

For these reasons, the judgment against the use of the labels must be sustained, and I proceed to that part against the use of portions of it.

Whether a name can be a trademark, technically, is doubted by the learned counsel; but I do not understand them to doubt that a defendant may be enjoined from using the plaintiff's name. The position was not taken, if it be sound; and as to this, impression is given that what the words of plaintiff's name really expressed is a kind of trade, and that, as the trade is open to all, the plaintiff can have no exclusive right to words that intelligibly designate the trade. On the facts, I think it was shown that there had been a purpose to use a name in imitation of plaintiff's on a label, and the case made it proper to consider whether there was not danger of a use of it apart from the labels. No closeness of reasoning, based on the fact that it has never been used by itself, is called for in a case which discloses a meditated general wrong. It does not seem to be material that the name is said, in the pleadings and findings, to be a trademark. The material thing is stopping its use by defendants.

As to the use of the numbers, "2," "101," and "32,"

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I am not able to see that the principles of *Gillott v. Esterbrook* (48 *N. Y.* 375), should not be applied. In that case and in this, the numbers were used to distinguish one pattern or character of goods from other patterns. In this case, the defendant's labels prove that the numbers were useful in the market to designate these patterns. The numbers were selected arbitrarily, and of themselves expressed no size or quality. The findings as to defendants' knowledge of the plaintiff's use of the numbers to designate their goods, and of the fraudulent intent as to plaintiffs and third persons, were substantially the same in the two cases. It was not shown in this case that the plaintiffs had acquiesced in the use of these numbers by others. I am of opinion, however, that the terms of the judgment were too broad in restraining the defendants from using in any way the cut or representation of a factory, on their goods. The plaintiff had never used that as a trademark by itself, in the same sense that the numbers were used. The defendants are still at liberty to use a picture of a factory in a proper manner. The judgment should have been confined to the use of an imitation, colorable or other, of the picture of a factory, used by plaintiffs. This is, however, hardly more than a matter of form, which could have been corrected upon suggestion, on the settlement of the judgment. The judgment should be modified by striking out the absolute prohibition of the use of a picture of a factory, and confining the imitation to a picture like that used by the plaintiffs.

The case disclosed individual acts by the defendants other than corporation, jointly with the corporation, and there was a joint liability to the plaintiff.

The judgment, after being modified in the manner that has been stated, is affirmed, with costs.

VAN VORST, J., concurred.

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**MARY A. RYAN, PLAINTIFF AND APPELLANT, v.
PETER M. WILSON, DEFENDANT AND RE-
SPONDENT.**

NEGLIGENCE.—LANDLORD AND TENANT.

In this case, the plaintiff, in the course of her employment, was injured by a revolving upright shaft upon defendant's premises, in a portion of the same not under his control, but leased, with the steam power which drove said shaft, to a tenant, at a specified rent, by which said tenant the plaintiff was at the time employed. For the damages resulting from said injuries the plaintiff sought to charge defendant, upon the ground that he did "negligently and wrongfully leave said revolving shaft uncovered, uninclosed, and unprotected."

Held, that the shaft in question was not dangerous in itself or in its working; the opportunity for damage would arise only in case a person should come in contact with, and be caught by it (*Loop v. Litchfield*, 42 N. Y. 358).

The defendant took no part, actually or by legal construction, in the tenant's omission to guard the shaft, he having parted with the possession and control of the floor upon which the accident occurred, without stipulating for a continuance of the conditions which would render the occurrence of the accident possible or probable; nor was it negligence on his part to leave the placing of the guard to the tenant, a person as competent to attend to it as himself, and whose interest and duty would impel him to do it.

Before SEDGWICK and VAN VORST, JJ.

Decided May 16, 1879.

Appeal from judgment that plaintiff's complaint be dismissed.

The action was for damages from defendant's negligence. The complaint alleged that defendant was the owner of a certain building; that the fourth floor of

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the building was occupied as a laundry by one George Little, as tenant of defendant; that the defendant was in possession of the other parts of the building; that the said building was "negligently provided by said defendant with steam power, inasmuch as a certain revolving shaft, which was incidental to the supply of the said steam power in said building, ran through all the floors thereof, and extended through the fourth floor as aforesaid; that the defendant, well knowing the premises, and while the owner and occupant of said building as aforesaid, did, on the first day of December, 1875, negligently and wrongfully leave said revolving shaft uncovered, uninclosed, and unprotected, of which the defendant had due notice, whereby the plaintiff, who was then lawfully in said building, being in the employ of said George Little, on said fourth floor, and in the pursuit of her occupation in said employment, then and there necessarily and carefully passing along said fourth story, was caught up, entangled and drawn round by said revolving shaft, whereby she was maimed, bruised, wounded, and received great bodily damage."

On the trial the judge stopped the giving of evidence, when, by the plaintiff's case, it appeared that the fourth floor, on which the accident occurred, was in possession of the tenant of defendant, as stated in the complaint, and held that the defendant was not liable for the consequences of leaving the upright shaft uninclosed.

Tremaine & Tyler, for appellant.

Ira D. Warren, for respondent.

BY THE COURT.—SEDGWICK, J.—The revolving upright shaft was not dangerous in itself or in its working (*Loop v. Litchfield*, 42 N. Y. 358). The oppor-

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tunity for damage would arise only if a person should come in contact with it, and be caught by it. And the complaint states the negligence, which caused the damage, to have been that the defendant did "negligently and wrongfully leave said revolving shaft uncovered, uninclosed and unprotected." Such being the omission and the cause of action, was the defendant responsible for it?

At the time of the accident the defendant had not any control of the floor on which must be placed any fence or guard about the shaft. He received rent for the premises, and for the power which moved the shaft, and at the time was furnishing that power. For so much he was responsible. As has been said, this was not dangerous in itself. His leasing and receiving rent did not involve a request by him, or a claim or an affirmance, that his tenant should not guard the shaft. The tenant had the right and actual power to guard it. The landlord, after parting with the possession and control of the premises, did not stipulate for or agree to continue or affirm that condition of things which constituted the alleged negligence. It is not the case of a landlord receiving rent for a thing which is a nuisance, *e. g.*, a wall obstructing an ancient light, and which the tenant's obligation prevents his taking down; nor the case of a defendant, who, in his conveyance of land, covenants that the grantee shall have the enjoyment of a right to set back water on another's land. In both these cases there is an actual complicity in the wrong. In the present case, the landlord has not, by his lease, or by any act, claimed that the tenant should omit to make sufficient guard, or promised to maintain the tenant's omission. The tenant's power is the same in this regard as if there had been an absolute conveyance of the property without covenants. It cannot be justly said that he took any part, actually or by legal construction, in the tenant's omission to guard the

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shaft, he having parted with possession and control of the premises.

Nor do I think that the defendant was negligent in renting and parting with the floor, without having placed a fence around the shaft. The negligence, if any, would consist in not supposing or not entertaining the notion that the tenant might not, or would not, sufficiently protect his servants. The fence would be a slight and inexpensive matter, and should properly be devised to meet the exigencies of the defendant's business. His arrangements might dispense safely with the guard. It was not negligence to leave the placing of the guard to a person as competent as the landlord to do it, and whose interest and duty would impel him to do it. The judgment should be affirmed, with costs.

VAN VORST, J., concurred.

JAMES COSTELLO, PLAINTIFF AND RESPONDENT,
v. THOMAS LAWLESS, ET AL., DEFENDANTS
AND APPELLANTS.

EVIDENCE.—TRIAL.

The defendants, on the trial, propose to read, and did offer in evidence certain parts of answers made by a witness (examined under commission for plaintiff), to cross-interrogatories put by defendants; the parts offered being the answers, "so far as the same were responsive to such interrogatories." Thereupon defendant moved to strike from the answers other parts, as immaterial, irrelevant, and not responsive to the interrogatories; which motion was denied.

Held, that upon the record the conclusion is, that the referee denied a motion to strike out of the deposition certain things which had

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not been put in evidence or proposed as such, which was not an error for which the judgment can be reversed.

Before SEDGWICK and VAN VORST, JJ.

Decided May 16, 1879.

Appeal from judgment for plaintiff, entered upon report of referee.

William Stone, for appellants.

Sidney S. Harris, for respondent.

BY THE COURT.—SEDGWICK, J.—The exceptions, taken for the defendants, in the action below, relate to objections made upon the trial in regard to testimony. The defendants on the trial proposed to read, and did offer in evidence, certain parts of answers, made by a witness (examined under commission for plaintiffs), to cross-interrogatories put by defendants; the parts offered being the answers, "so far as the same were responsive to such interrogatories." Thereupon the defendants moved to strike from the answers other parts as immaterial, irrelevant, and not responsive to the interrogatories. It does not appear that the plaintiffs objected to the reading of what defendants claimed to be responsive, or that plaintiffs offered to read the other parts, or that plaintiff required that defendants should read the other parts, or that the referee required it, or even that defendants did read in evidence the parts they moved to strike out. It is not stated that the plaintiffs opposed the motion to strike out. The conclusion is that the referee denied a motion to strike out of the deposition certain things which had not been put in evidence or proposed as such. Of course, that did not affect the determination by the referee,

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who passed only upon what was in evidence, and he probably was correct in refusing to suppress any part of the deposition, although that is immaterial. The record does not show any error on which the judgment can be reversed.

Judgment affirmed, with costs.

VAN VORST, J., concurred.

**MICHAEL DONAHUE, PLAINTIFF AND APPELLANT,
v. ROGER O'CONOR, DEFENDANT AND RE-
SPONDENT.**

TAX SALES.—PROCEEDINGS TO DETERMINE CLAIMS TO REAL PROPERTY.

—NOTICE BY PUBLICATION.

The plaintiff herein claimed title in fee to the premises in question, under the deed of a referee in foreclosure proceedings, which deed was dated June 8, 1876. The defendant claimed title to the same under a lease for sixty years, made by the mayor, &c., March 18, 1876, upon a sale for taxes.

Held, that such a claim may be determined in an action like the present, which was brought to determine conflicting claims to certain real estate, under section 449 of Code of Procedure, and 2 R. S. 818, and amendments.

The legislature has power to enact that the production of a deed or lease given by the mayor, &c., upon a tax sale, shall be presumptive evidence of the title of the purchaser, and that all the statutory requirements have been complied with; but proceedings of the character in question, *i. e.*, tax sales, are to be closely scrutinized, and the provisions of the statute must be sedulously followed.

Held, that the proceedings herein upon the sale to defendant were irregular and defective, and the lease was therefore void.

1. With respect to the lands in question, the statutory notice published did not state on what particular day they were sold. It stated that the lands described in an accompanying list were

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sold on the 9th, 12th, 18th, and 25th days of March, 1874 (without specifying what lands were sold on the different days) and that, unless redeemed on or before two years from the date of the respective sales, which will be on the 9th, 12th, 18th, and 25th days of March, 1876, the mayor, &c., would execute a lease to the purchaser. The statute speaks of a "certain," not an uncertain day.

2. The notice to owners and occupants, which the statute require shall be given by the "grantee" to whom the premises "*shall have been conveyed*," was never served upon the plaintiff, the owner of the premises, and was served upon the occupants and the former owner *before the premises were conveyed*, which service, so far as made, was therefore premature and ineffectual.

The statute requires that notice of sale shall be published in *ten* different newspapers of New York city. *Held*, that a publication of the same in a paper printed in the German language, as one of the above number, will not invalidate the notice.

The defendant, not having an absolute and perfected title, his act in entering upon the premises and collecting rent from the tenants was not an interruption of the plaintiff's possession. Though the tenants, for a few months, recognized the defendant as landlord, they subsequently resumed their proper relations to plaintiff, which have continued ever since.

Before SEDGWICK and VAN VORST, JJ.

Decided May 16, 1879.

Appeal by plaintiff from a judgment in favor of plaintiff, rendered by a judge at special term. The facts are stated in the opinion of the court.

John Townshend, attorney, and of counsel, for plaintiff and appellant, urged :—I. The acts of defendant in entering on the premises, and procuring the tenants to attorn, were illegal and void, and did not in law or in fact interrupt the possession of plaintiff (2 *R. S.* 507, § 1; 1 *R. S.* 744, § 3.)

II. The attornment did not interrupt the possession of plaintiff; his tenants, Curley and Callaghan, continued in uninterrupted possession. "The possession

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of the tenant shall be deemed the possession of the landlord," "notwithstanding such tenant may have acquired another title, or may have claimed to hold adversely to his landlord" (2 R. S. 294, § 13 ; *Code of Pro. of 1849*, § 86 ; *Code of Civil Pro. of 1876*, § 373 ; *Burhans v. Van Zandt*, 7 Barb. 91).

III. The lease purports to be given under the Law of 1871, c. 381. That law among other things provides : " § 3. That when a tax has been unpaid for three years after confirmation, the clerk of arrears may advertise the taxed property for sale." He is to publish the notice of sale in ten daily newspapers. Upon the sale, a certificate is to be given to each purchaser, describing the lands sold, and the time for which sold, &c. (§ 3). § 4. If no redemption is made, the clerk of arrears is to publish a notice to redeem in one daily newspaper "in such form as he shall deem best calculated to give notice of such sale, that unless the lands sold be redeemed by a certain day, they will be conveyed to the purchaser, and if no redemption is made within two years from the date of said certificate, a lease is to be executed to the purchaser." The lease is declared to be "presumptive evidence that the sale and all proceedings prior thereto, from and including the assessment on said lands . . . and all notices required by law to be given previous to the expiration of the two years allowed to redeem were regular." § 13. If, "at the time of the conveyance,"—*i. e.*, at the time of making the lease,—the premises are occupied, notice to redeem is to be served "on the person occupying such lands or tenements, and in all cases, notice to redeem is to be served on the persons owning the property so conveyed." The notice is to state the sale and conveyance, the person to whom made, and the amount of consideration money mentioned in the conveyance, with the addition "of the sum paid for the lease," and that if those sums are not paid the conveyance

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(lease) will become absolute. § 15. The grantee, "to complete his title to the land conveyed," shall file an affidavit with the clerk of arrears of the service of the notice to redeem. § 17. The owner, occupant or any other person may, at any time within the six months mentioned in such notice, redeem, by paying purchase-money and interest, &c.

IV. It is too well established to need at this time any confirmation by argument, or citation of authorities, that, independently of any statute, dispensing with such proof, a lease on a sale for taxes can be supported only by the proof of all the preliminaries which authorize a sale. The distinction between the legality and the existence of an assessment was maintained in *Sutton v. Calhoun* (14 *La. Ann.* 209). The provision that the sale shall be presumed regular applies only to the sale, and not to the antecedent acts (*Doughty v. Hope*, 3 *Denio*, 594). But the statute does not provide that the lease shall be evidence that the tax was remaining unpaid, or that it had remained unpaid for three years, and these are essential to give a power to sell.

V. As to the notice of sale, if it was proper (as to which hereafter) to advertise in any newspaper, it should have been published in ten daily newspapers. The notice was published in nine newspapers,—*i. e.*, English newspapers. It is claimed that the notice of sale was also published in the *City Record*. Something was published in a German newspaper, in the German language and German characters. What it was that was so published the court does not know. *a.* The *City Record* is not a newspaper. It is the official organ of the corporation of New York. It has no news, is no more a newspaper than is the publication of the proceedings of any body, corporate or natural. The publication, therefore, in that publication goes for nothing. *b.* A publication in a German paper was not

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sufficient. The publication in German cannot be a notice to an English-speaking people. For where the language published is one foreign to the place of publication, it will not be assumed that those who heard or read understood it (see *Aman v. Damn*, 8 *Com. B. N. S.* 597; *Stark*. 3 ed. by Folkard, 135; *Keene v. Ruff*, 1 *Clarke [Iowa]*, 482; *Danver's Abr. Pl.* 1, 2, 7). To allege a publication of English words, and prove a publication of words in another tongue, is a variance (*Keenholts v. Beeker*, 5 *Den.* 346; *Kirschlangher v. Slusser*, 12 *Ind.* 453). Where an indictment for forgery set out the alleged forged instrument in the Prussian language, the whole court of ten judges held the indictment insufficient (*Rex v. Goldstein*, 3 *Brod. & B.* 201). Under a commission to examine a foreign witness who cannot speak English, the deposition must be taken in English by an interpreter (*Belmore v. Anderson*, 2 *Cox Ch. Cas.* 288). The supreme court of Missouri held, that when legal notices are to be published in a newspaper, an English paper is always intended, unless expressed otherwise (*Graham v. King*, 50 *Mo.* 22).

VI. The description of the premises to be sold as "lot," when in truth there was a house and lot, was such a misdescription as should avoid the sale. It is "of equal if not greater importance that the property should be so definitely described that no purchaser could be at a loss to estimate its value" (*Blackwell on Tax Titles*, 2 ed. 229).

VII. The defect in the publication of the notice to redeem is this: it was published in the *Express*, and should (if the *City Record* is a newspaper) have been published in the *City Record*. *Laws of 1869*, c. 875, § 1, provided that the mayor and comptroller should designate six daily newspapers, and six weeklies, but no more, in which to publish the proceedings of the board of supervisors, and all proceedings and notices

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relating to county affairs. Next came *Laws of 1870*, c. 137, p. 366 (April 5, 1870), which was amended in 1871, c. 574, p. 1231 (April 18, 1871), § 1, and repealed *Laws of 1873*, c. 335. Then, by *Laws of 1870*, c. 383, p. 882, § 1, it was provided that all advertisements for the city should be published in newspapers to be designated by the mayor and comptroller, and the payment of any money for advertising of any description, for or on account of the corporation, except in such newspapers, was prohibited. The papers thus designated became known as "Corporation papers." The court of appeals held that this provision made it imperative to publish in the designated newspapers all advertisements for city and county purposes (*Re Douglass*, 46 *N. Y.* 42; *Re Astor*, 50 *Id.* 366; *Re Smith*, 52 *Id.* 526). Then came *Laws of 1871*, c. 381 (April 8, 1871), requiring the notices of tax sales to be published in ten daily newspapers, and the notice to redeem in one newspaper. This must have meant, so long as the *Laws of 1870*, as amended 1871, c. 574 (April 18, 1871), were in force, newspapers designated by the mayor and comptroller. But *Laws of 1870*, chapters 137 and 383, were repealed by *Laws of 1873*, c. 335, § 119, p. 522 (the city charter), and by section 111 of that law provision is made for the publication of the *City Record*, and then it is enacted (1) that all advertising required to be done for the city, and (2) all notices required by law to be published in corporation papers, shall be inserted at the public expense only in the *City Record*, and a publication therein shall be a sufficient compliance with any law or ordinance requiring publication of such matters or notices. Then follows an exception in the case of advertising for contracts, and allowing publication in case of contracts in a German newspaper. Section 119 of said act of 1873 repeals all acts and parts of acts inconsistent therewith.

VIII. The advertisement to redeem was not properly

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framed. It should give notice that unless the premises are redeemed by a certain day they will be conveyed to the purchaser. Redemption must be made "within two years from the date of the before-mentioned certificate" (*Laws of* 1871, c. 381, § 4). The certificate here mentioned is the certificate of sale delivered to each purchaser (same law, § 3). Now, the notice published states in the heading, that the lands described in the following list were sold on the 9th, 12th, 18th and 25th days of March, 1874, and that unless redeemed "on or before the expiration of two years from the date of the respective sales, which will be on 9th, 12th, 18th and 25th days of March, 1876," the mayor, aldermen and commonalty of the said city will execute leases to the purchasers. Then follows the description of the property, as thus :

On which street.	Between what streets.	To whom assessed.	Block No.	Ward Map No.	No. of Years sold for.	Amount of Sale.
Third and Fourth Avenues.	88 & 89	P. Thorp	379	4	60	\$133.30

How, from these particulars, can the owner know with certainty which is his last day to redeem? Although his time to redeem is limited by the date of the certificate of the sale, no information whatever as to the date of the certificate is given. If it is said that it will be presumed that the date of the certificate is the date of the sale, we deny that such a presumption can be indulged in; there is nothing to warrant such a

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presumption. But allowing such a presumption, then when is the day to redeem? It nowhere appears which property was sold on the 9th, which on the 12th, which on the 18th, or which on the 25th, and how can the owner know on which day his property was sold, or until which day he has to redeem (*Hand v. Ballou*, 12 *N. Y.* 541). The extreme accuracy required in these notices is illustrated by the case of *Adriance v. McCafferty* (2 *Robt.* 153), where it was held that a notice requiring objections to be served on "the commissioners," instead of upon the chairman of the commissioners, made the assessment and sale void.

IX. The notice to owner and occupant was not sufficient, because, *a.* The notice was served before the lease was executed; *b.* The notice was not served on all the occupants; *c.* The notice was served on the former owner, and has never been served on the owner who was owner "at the time of the conveyance." There can be no doubt of the fact that the notice to redeem was served before the lease was executed. Cady distinctly states that the lease was not executed until a day or two prior to December 30, 1876, and the defendant states the lease was not delivered until after January 6, 1877, while Daly testified he served the notice on March 22, 1876. The lease is signed by John Kelly, comptroller, and he did not take office until December, 1876. The fact is undoubted as to the time of the execution of the lease, and the law is as undoubted that such a service was premature. Section 13 of the *Laws of 1871*, c. 381, provides that whenever lands sold for taxes and conveyed shall, at the time of conveyance, be in the actual occupancy of any person, the grantee, to whom the same shall have been conveyed, shall give notice, and the notice is to state the sale and conveyance, the person to whom made, the amount of consideration money mentioned in the conveyance, and the amount paid for the lease, and that,

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unless redeemed, the conveyance will become absolute. It seems too patent to need argument ; indeed, no argument could make it clearer than does the reading of this section, that the notice is not to be served until after the property has been conveyed. Besides, such is the construction put on a similarly worded statute. MARVIN, J. : "Hence he must have a conveyance before the notice can be served" (*Hand v. Ballou*, 12 *N. Y.* 541 ; *Paillet v. Young*, 4 *Sandf.* 58). Until this notice is served and the six months have expired in which to redeem, the purchaser has no estate in the land. His title is not complete till service made, and affidavit of service filed (*Laws of 1871*, c. 381, § 15 ; *Smith v. Sanger*, 3 *Barb.* 360). The notice was not served on all the occupants, and until this is done the purchaser's title is not complete. After service of the notice to redeem, the owner, occupant or any other person may redeem (*Laws of 1871*, c. 381, § 17 ; *Comstock v. Beardsley*, 15 *Wend.* 348 ; *Bush v. Davison*, 16 *Wend.* 550 ; *Leland v. Bennett*, 5 *Hill*, 286 ; *Smith v. Sanger*, 3 *Barb.* 360). There is one other irregularity which may be urged, the want of filing the affidavit, and notice of demand required by *Laws of 1843*, c. 230, art. 11, §§ 7, 8, 9, as amended *Laws of 1850*, c. 121, § 32 ; but the other objection seems so substantial, it is not deemed necessary to enlarge on this point.

X. The motion for a mandamus was addressed to the discretion of the court. It was a mere motion, not an action. And being a mere motion it was not *res adjudicata*. Besides, the same question was not in issue in the motion as in the action (*Lalor v. Dunning*, 56 *How. Pr.* 209 ; *Boon v. Moss*, 70 *N. Y.* 466).

Thomas N. Cuthbert, attorney, and *J. A. Beall*, of counsel, for defendant and respondent, urged :—I. The lease established a *prima facie* title in the defendant to hold and enjoy the premises for the term of sixty

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years, and threw upon the plaintiff the burden of showing that title to be bad. It was objected by the counsel for the plaintiff at the trial that the act intended that the lease should be presumptive evidence of the regularity of the proceedings only, and that it was incumbent upon the purchaser at the tax sale, the defendant here, to show by other evidence the fact that the proceedings had been had; and the lease itself showed only their regularity after they had been proved to have taken place, and for this construction counsel referred to two cases, but neither of them appear to have arisen under a statute similar to that of 1871 (14 *La. Ann.* 209; 3 *Den.* 594; *Blackwell*, 401, § 4). We are not without judicial decisions to the same effect in this State (*Bank of Utica v. Mersereau*, 3 *Barb. Ch.* 528). In *Hand v. Ballard*, 12 *N. Y.* 543, the court says: "The legislature certainly have power to determine by law what shall in civil cases be received by the courts as presumptive evidence." Under the California statute of 1854 it was not necessary to recite in a tax deed the various acts showing a compliance by the revenue officers with the condition of the statute. Recitals of these acts in the deed are *prima facie* evidence, but if not inserted, may be proved *aliunde* (*Weatherby v. Dunn*, 32 *Cal.* 106; *Morse v. Shear*, 25 *Id.* 38). Nor is it necessary, before introducing the deed in evidence, to prove that the person by whom it was executed held the office of tax collector when the sale was made. "General recitals that the property was duly assessed, and the tax levied upon it according to law, are sufficient to make the deed *prima facie* evidence" (33 *Cal.* 287; 39 *Id.* 326).

II. The sale was well and sufficiently advertised. The proof is that the advertisement was published in eleven daily newspapers, ten in the English language, and one in the German language. It has been contend-

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ed that the *City Record* was not such a newspaper as was required by the act of 1871. But the act does not describe the newspapers in which the notice shall be published, further than that they shall be "daily newspapers published in the city of New York." It appears that the *City Record* publishes news, and of an interesting and important character—viz., the proceedings of the several departments of the city government, proposed municipal improvements, contracts and investments. The several departments are furnished with copies of the paper. They are furnished gratuitously to every newspaper, public library, and public institution, and it may be sold to the public generally. To say, in the face of these facts, that the *City Record* is not a daily newspaper, seems to be the merest hypercriticism. But even without the advertisement in the *City Record*, the notice of the sale was sufficiently published. The law, chapter 381, section 3, of 1871, does not require the notice to be published in the English language. The only statutory provision in this State for the use of the English language is to be found in the third volume of the Revised Statutes, at page 467, which is that "all writs, processes, proceedings and records in any court within this State, shall be hereafter conducted in the English language." What the legislature intended when it provided for the publication of the notice of sale, was that the best and fullest publicity should be given, to the end that the notice might reach the owners of property listed for sale, and all persons likely to be in any way interested therein. It is a fact so well known that the court will take judicial cognizance of it, that a very large number of our citizens, probably one-fifth of the entire population of the city of New York, are Germans, speaking and reading the German language, and many of them no other. The cases cited by the learned counsel to sustain his objection to the publica-

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tion in the *Staats Zeitung* are none of them applicable to this case. With one or two exceptions they were cases of libel or slander, and went only to this extent, that where the words were uttered in a foreign tongue, it should be shown that they were understood by those who heard or read them.

But in one case of slander, WRIGHT, J., said—citing *Starkie*, p. 85: “If that is good law, the rule seems equally applicable to German words, spoken in a German county like this” (*Bechtell v. Shatler, Wright* [O.], 107). The Missouri case undoubtedly depended in some measure upon a statute in relation to legal proceedings similar to that in force in this State, and cited *supra*, or it may well be founded upon the English statute in the same behalf, which is part of the common law in this country. The provision of the charter of 1873 (*Laws of 1873*, p. 515), for the publication of notices in the German language, we submit, sustains the action of the comptroller in making the German publication—it is a direct legislative recognition of the fact of the large German-speaking and reading population of the city of New York.

III. The description of the property in the notice of sale was sufficient. It was described as being Ward No. 4 in block No. 39, between the Third and Fourth avenues and Eighty-eighth and Eighty-ninth streets, and assessed to Thorp, the owner (*Blackwell's Tax Titles*, 250; *Ronkendorff v. Taylor*, 4 *Pet.* 349; 2 *Ohio*, 278; 3 *Miss.* 452).

IV. The notice to redeem was well and sufficiently published. That notice stated the location and description of the property, and the ownership, precisely as in the notice of sale, and gave the amount for which the property was sold. It is objected that this notice stated that the sale took place on several successive days, and that the property might be redeemed within two years from the time of sale, and did not state as

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to each particular lot, nor as to the lot in question, upon what day it was sold. The act, chapter 381 of the Laws of 1871, says, at section 4: "The clerk of arrears, under the direction of the comptroller of the city of New York, shall cause an advertisement to be published at least twice in each week, for six weeks successively, in one of the daily newspapers printed and published in the city of New York, in such form as he shall deem best calculated to give notice of such sale, that unless the lands and tenements sold be redeemed by a certain day, they will be conveyed to the purchaser." The form of the notice is here left to the discretion of the clerk of arrears. Embodying, as it does, all the essential particulars, the court will not now say that that discretion was improperly exercised. It would be a strong case, indeed, a manifest case, of carelessness or negligence, which the court would so characterize. That the exact day upon which the lot in question was sold, was not stated, was not calculated to mislead, or in any way injure, the owner or the person wishing to redeem. The notice stated that the sale was held on several different days, commencing on March 9. The notice to redeem is not required to be published in the *City Record*. The learned counsel cited the Laws of 1869, chapter 875, and the Charters of 1870 and 1873, to show that the notice to redeem should be published in designated official papers, and that since 1873 the *City Record* was such paper. The most cursory examination will satisfy the court that those acts have no bearing upon the advertisement either of sales for taxes, or to redeem therefrom. The designated official papers were to publish the proceedings of the supervisors and of the common council, and no others were required to be published therein, and the cases cited were all proceedings to vacate assessments, where the questions were as to the publication of the resolutions and ordinances of the com-

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mon council. The law of 1871, chapter 381, however, stands separate and apart from the charters, and there is no necessary connection between them; they are not *in pari materia*, neither are they in conflict, but if there is any conflict between the act of 1871 and the charter of 1870, then the charter must be held to be modified by the act of 1871, that being the later. So much down to 1873. Under the charter of that year counsel argues that publication of notice to redeem must of necessity be made in the *City Record*, because at section 111 it is provided that all advertising required to be done for the city, and "all notices required by law to be published in corporation papers, shall be inserted at the public expense only in the *City Record*;" the erroneous punctuation of the extracted words in the appellant's brief shows how the learned counsel fell into his mistaken construction of the statute. There is no law requiring the notice in question to be published in corporation papers, and the prohibition as to publication in other papers is only as to publication at the public expense. The expense of publishing the notices under the law of 1871, first in ten papers and then in one, is, pursuant to section 3, to be charged upon the property, and included in the amount for which it is sold; these publications are not, therefore, at the public expense, and not within the prohibition of the charter.

V. The notice to redeem, within the additional period of six months, was also served within the time required by the statute. It is contended that the statute contemplates a service by the purchaser at the time, and only at the time, of the actual delivery of the conveyance to him, and for that several authorities were cited (*Comstock v. Beardsley*, 15 *Wend.* 348; and *Hand v. Ballou*, 12 *N. Y.* 541). These cases were different in every essential from the case at bar. Both were sold by the comptroller of the state, and absolute

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deeds in fee were given. In the first case, the lands sold were occupied by one Bean, who apparently had no title thereto, but who lived upon and cultivated the lands. No notice to redeem was ever given to him. The court held that he was in the actual occupancy of the premises, and therefore notice should have been given. In *Hand v. Ballou*, the land was sold in December, 1848, and on December 17, 1850, the purchaser became entitled to the deed, which, bearing that date, was actually delivered in July, 1851. In December, 1850, the land was not occupied, but it was in July, 1851. No notice to redeem whatever was given to any one. It is also contended that the notice was not adequately served, because not served upon all the tenants of the premises. It never was intended that personal service of the notice should be made upon the occupant of every room in a tenement house. The principal tenant upon these premises, occupying the principal apartment, was Mrs. Callahan, and she was actually served with the written notice. The other tenant was present, and had a verbal notice of the whole thing. It was explained to him, and he understood it. The occupant whom the statute intended should be served with this notice, was such an occupant as could be made liable for the tax. This was held in the case of *Comstock v. Beardsley*, before cited. Moreover, this objection is not available to the plaintiff, but only to the tenant not served. Even less tenable is the objection that Donahue was not served with notice; he knew that the time for issuing the lease had arrived, and that notice to redeem might have been duly served on Thorp. The law of 1871 forbids the recording of the lease until the certificate prescribed by that act has been given, and as we have seen that the lease and certificate are given together, the appellant's construction would prevent a title under a tax sale from ever vesting.

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VI. It should be borne in mind that the previous decisions upon the validity of tax titles have been made in cases where the fee of the property was disposed of, and not where, as in New York city, the utmost that can be conveyed is a leasehold interest. Formerly, too, the laws governing sales for taxes were invalid, cumbrous, and difficult of execution and of comprehension. Where the laws have been simplified, and are easy to be understood, and carefully regard the rights and interests of the citizen, the same reason for straining every point against a tax-title does not exist (*McMillen v. Robbins*, 5 *Hamm.* 28; *Hinman v. Pope*, 1 *Gilm.* 141, 142, SEARLES, J., dissenting; *Atkins v. Hinman*, 2 *Id.* 452, 453).

VII. At most, the plaintiff is entitled only to redeem. We have shown, we submit, that the sale, and the lease given thereunder, were valid, and if the purchaser has not served the notice to redeem, in accordance with the provisions of the statute, it would not invalidate the lease, but only extend the property-owner's time to redeem.

VIII. The plaintiff is not entitled to recover in this proceeding or to maintain this action. 1. This is a strictly statutory proceeding, unknown at common law. The burden of proof, therefore, is upon the plaintiff, to show that his case is within the provisions of the statute, otherwise he cannot maintain his action (*Bailey v. Southwick*, 6 *Lans.* 366; *Austin v. Goodrich*, 49 *N. Y.* 266). 2. One of the first requisites of the statute is that the plaintiff must prove that he, or those through whom he claims, have been for three whole years prior to the commencement of the action in the actual possession of the property, claiming the same in fee, &c. (*R. S.* title 2, c. 5, part III.; see § 1; § 2, subd. 3; and § 7). 3. It is submitted that the defendant clearly proved that the plaintiff was not in the actual possession of the premises during a period of

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three months shortly prior to the commencement of this action. It is not disputed that O'Connor, the defendant, claiming title to these premises, collected the rents of the same for the months of February, March and April, 1877, made alterations and repairs therein, and placed a new tenant, Bennett, in the upper story. The term actual possession, as used in this statute, has been the subject of judicial interpretation, and has been held to mean the actual physical use, occupation and enjoyment of property, whether legal or not, as distinguished from a strictly legal or constitutional possession (see *Boylston v. Wheeler*, 61 *N. Y.* 521 ; *Churchill v. Onderdonk*, 59 *Id.* 134 ; *Cleveland v. Crawford*, 7 *Hun*, 616). 4. But the appellant claims that O'Connor was a mere trespasser on his property, and had no right to collect rents or take possession. The answer to this is that if O'Connor was a trespasser, then he must have been in the actual possession of the premises, or some part thereof, in order to constitute trespass, and that such possession on his part would defeat the plaintiff's right to recover in this action. But O'Connor was not a trespasser, if his lease was valid. In that case he was entitled to the possession of the property, no matter how that possession was obtained. And if this latter proposition were not true, the defendant has shown that he obtained possession lawfully. The tenants attorned and paid rent to him, as they had a right to do. While a tenant may not dispute the title of his landlord, he may always show that his title has ceased and may attorn and pay rent to the rightful owner (see *Despard v. Walbridge*, 15 *N. Y.* 377 ; *Jackson v. Rowland*, 6 *Wend.* 670).

IX. Another action for the same cause is pending between the same parties. The affidavits, notice of motion and notice of appeal from order denying motion, offered in evidence by the defendant, show that another action, or proceeding, for the same cause as in this

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action, and between the same parties, is now pending. It is true that this prior proceeding is not an action, but a special proceeding, and that the clerk of arrears, who is a party defendant in that proceeding, is not made a party to this action, but both these objections have been held to be immaterial. The object of both actions is the same, and the pendency of the first is a bar to the second (*Dwight v. St. John*, 25 *N. Y.* 203 ; see *Groshon v. Lyon*, 16 *Barb.* 461 ; *Ogden v. Bodle*, 2 *Duer*, 611).

BY THE COURT.—VAN VORST, J.—This is an action under section 449 of the Code of Procedure, and 2 Revised Statutes, 313, and the several amendments thereto, to determine claims to real property (*Burnham v. Onderdonk*, 41 *N. Y.* 425 ; *Barnard v. Simms*, 42 *Barb.* 304).

The plaintiff, by his complaint, claims to have an estate in fee in the lands in question. His title was derived through a conveyance made to him by a referee in pursuance of a sale made under a judgment in an action for the foreclosure of a mortgage executed by one Thorp, the owner of the land. The referee's deed is dated June 3, 1876. The plaintiff, in his complaint, alleged that he, and those through whom he claims, have been in the actual possession of the land for three years before the commencement of his action.

The defendant claims title to the premises under a lease made by the mayor, aldermen, and commonalty of the city of New York, for sixty years, from March 18, 1876, on a sale for taxes. Such a claim may be determined in this action (cases above cited).

By his answer, the defendant denied each and every allegation of the complainant, except as admitted, and set up the particulars of his title, through the lease granted to him by the mayor, &c., &c., of New York.

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The learned judge, before the action was tried at special term, found as a fact, that neither the plaintiff, nor those from whom he claimed, had been in the actual possession of the premises for three whole years before the commencement of the action, and, as his first conclusion of law, decided that the plaintiff's complaint should be dismissed. But, on the assumption that the plaintiff could maintain the action, the judge decided that under the facts found by him the defendant is entitled to the possession of the premises as owner thereof until the term of sixty years, being the time limited in and by the lease, under which he claimed, should be complete and ended, and rendered judgment accordingly. In reaching this conclusion, the judge decided, as matter of law, that the sale of the premises by the mayor, aldermen and commonalty of the city of New York, and all the proceedings prior thereto, from and including the assessments thereon, for taxes and Croton water rents, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular, and according to the provisions of the statute in such cases made and provided, and that the six months' notice to redeem the premises from the sales was duly served upon the proper parties. The plaintiff's counsel excepted to the findings of fact, upon which the conclusions of law above indicated were reached, as also to all the conclusions of law.

From the character of the judgment from which this appeal is taken, the first question to be determined is whether the defendant's claim under his lease can be legally maintained, and its solution determines in fact all the points involved in this action.

The defendant gave his lease in evidence, and claimed affirmatively under it. By the terms of the act under which the proceedings were had, which resulted in the lease to the defendant, the lease, when

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properly executed, is made presumptive evidence that the sale and all proceedings prior thereto, from and including the assessments on the lands and tenements, for taxes, assessments, or Croton water rents, and all notices required by law to be given, previous to the expiration of the two years allowed to redeem, were regular, and according to the provisions of the statute in such case made and provided; and the purchaser shall lawfully hold and enjoy the land, against the owner, until the purchase term is complete (*Laws of 1871, c. 381, § 4*).

The legislature has the power to determine what shall be presumptive evidence of regularity to uphold the title of the purchaser (*Hand v. Ballou, 12 N. Y. 543*). The burden then rests upon the plaintiff to show that the defendant's claim is unjust, and that the proceedings through which he claims are irregular and illegal, and the lien void. Proceedings of the character of those in question, instituted, and in all their essential details regulated by statute, are closely scrutinized, and the provisions of the statute should be sedulously complied with (*Brown v. Goodwin, 1 Abb. New Cas. 458*). It is to be observed that the lease is only presumptive evidence of regularity. That the proceedings are not, in fact, regular and valid, may be shown. The plaintiff's counsel urges that the proceedings are irregular and defective in several particulars, and that the lease is therefore void.

In the first place, he urges that the notice of sale required by the statute was insufficient. The statute provides that no houses or lots shall be sold or leased for the non-payment of any tax, assessment or Croton water rent, which may be due thereon, unless notice of such sale shall have been published once in each week successively, for three months, in at least two of the daily newspapers printed and published in the city of New York.

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It is objected that one of the newspapers in which the notice was published was printed in the *German language*, and that for that reason the notice was void.

It may be conceded that the general intent of the statute is that these notices should be published in newspapers printed in the English language. As the object is to give general as well as specific notice, in an effective form, it could not be otherwise well attained. In the case to which we are, by the plaintiff's counsel, referred, *Graham v. King* (50 *Mo.* 22), publication was made in only one newspaper, and that printed in German. There were two English papers printed in the same county; the court held the publication "obviously bad," and said: "When notices are to be published in a paper, an English paper is always intended, unless it is expressed otherwise." There were special circumstances in that case which showed clearly enough that the insufficiency of the notice had wrought an injury to interests designed to be protected through the publication which the court had ordered. The good faith of the act in question was open to criticism. As above stated, the object of the statute was to give notice to all interested, and how that end could be best reached, must be left in a measure to the good judgment of those to whom the duty of carrying out the provisions of the law, in the selecting of the newspapers, is left.

The court may certainly take notice of the fact that a very large number of our citizens are of German birth, and speak and read the German language. And if those, upon whom the duty is cast of making a selection out of the daily newspapers in the city of New York, of ten journals, in which the notices in question should be printed, should select one paper printed in the German language, as the most effective way of giving the notice required to all concerned, we cannot perceive that they have violated the law, or

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done injustice to any interest. The propriety of the publication of legal notices in a German newspaper, that the same may reach those who read that language, is recognized by the *Laws of 1873*, c. 335, § 111. And in making the selection of the one German newspaper out of ten to be designated, the municipal authorities but recognized a fitness in things, which subsequently received legislative sanction. Coming to this conclusion as to this subject, it is not important to inquire whether or not the *City Record* is a newspaper, or whether a publication therein meets the requirements of the statute in this instance.

An objection of a more serious character is, however, taken. It is that the notice to redeem in pursuance of section 4, of chapter 381, of the *Laws of 1871*, was defective in substance. We are of opinion, upon consideration, that this objection is well taken.

The above section requires the clerk of arrears to publish a notice in one of the daily newspapers, printed and published in the city of New York, in such form as he may deem best calculated to give notice of such sale, that unless the lands and tenements are redeemed by "a certain day," they will be conveyed to the purchaser.

The notice published did not specify any "certain day," on, by, or before which the land was to be redeemed. The notice stated that the lands described in an accompanying list were sold on the 9th, 12th, 18th and 25th days of March, 1874, and that, unless redeemed, on or before two years from the date of the respective sales, which will be on the 9th, 12th, 18th and 25th days of March, 1876, the mayor, &c., &c., would execute a lease to the purchaser.

With respect to the land in question, the notice did not state on what particular day it was sold. It might have been sold on the 9th of March, the first day, or on

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the 25th, the day last named, or on either of the intermediate days, and the day to redeem might expire on either of such days, according to the day on which it was sold. The statute speaks of a "certain," not an uncertain, day.

Nor can the notice be aided by the date of the certificate issued to the purchaser, as that is not given in the notice.

In reply to this objection, it is urged that the clerk of arrears had a discretion as to the form of the notice. That discretion, however, as to mere form, was to be exercised under the express language of the act, so that the notice should be one best calculated to give information of the sale. That could only be well done by expressly naming the day on which the premises in question were sold. The day on which the right of redeeming was to expire was "a certain day," which, we think, should not have been left indefinite, or as to which, by connecting it with other days during which much other property was sold, a mistake might readily occur. Suppose the party affected relied on the last day named, and attempted to redeem at the expiration of two years from that day, he could not have done so, if the property had been in fact sold on the first day.

We do not think the notice given was such as the statute contemplated, and as it was to operate upon and limit a right of redeeming property sold, the law under which it was given should have been strictly followed, and a day "certain" for redemption should have been stated. The section of the statute under consideration proceeds to say that if the person or persons claiming title to the lands shall not, within two years from the date of the certificate, pay to the clerk of arrears, for the use of the purchaser, the sum mentioned in the certificate, together with interest at the rate of fourteen per cent. per annum from the date of

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certificate, the comptroller shall execute to the purchaser a lease of the lands so sold for the term of years for which they shall have been sold.

The date of the certificate, as already observed, was not stated in the notice published. The statute does not require that it should be stated, nor as information for the guidance of the owner was it necessary to be stated, provided a day had been distinctly named on which this property was sold, or a day "certain" had been mentioned for redemption. But neither was definitely stated.

We think the defect in the notice was one of substance, and that the lease granted in pursuance of a default in redeeming under such notice is void. If this conclusion be correct, the judgment should for this defect be reversed. But there is another objection which appears to be equally fatal to the defendant's case. It is further objected by the plaintiff that the notice to owners and occupants required to be given by the purchaser at the sale in pursuance of section 13 of chapter 381 of the *Laws of 1871*, was not given to him. This section provides that if the land in question, sold "and conveyed," as in the act provided, shall, at the time of the conveyance, be in the actual occupancy of any person, the grantee to whom the same shall have been conveyed, or the person claiming under him, shall serve a written notice on the person occupying such land, and in all cases on the person owning the property so conveyed.

The object of the notice being to give the owner, in so far as he is concerned, further time to redeem, by paying the amount for which the premises were sold at the tax sale, with an addition of forty-two per cent. on such sum, and that unless paid the conveyance would become absolute, and the owner be forever barred, &c., &c. A service upon the occupants of the premises is not a service on the owner. The defect in the notice is

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that it was served upon the occupants by the purchaser before the conveyance to him, and that no service was ever made upon the plaintiff, the owner. The evidence is, and the court has found, as a fact, that the lease to the defendant was executed and delivered on or about December 30, 1876, while the notice was served on the occupants and the former owner, March 22, 1876. The service of this notice was premature and wholly ineffective. It was the "grantee" to whom the premises "*shall have been conveyed*" who was to give the notice. Until conveyance actually made, there could be no grantee (*Hand v. Ballou*, 12 *N. Y.* 541 ; *Paillet v. Young*, 4 *Sandf.* 58).

Besides, the notice required by this section was also required to be served on the person owning the premises "so conveyed." When the lease was actually made and delivered by the comptroller, in December, 1876, the plaintiff was the owner of the property, and had been since the month of June, 1876, and he has never been served with the notice required by section 13 of the act.

The title of the purchaser at the sale is only complete after the service of the notice required by section 13, and proof thereof shall have been made and filed as provided in section 15, and after the persons entitled to redeem shall have failed to pay the amounts within the time prescribed by such notice, section 16.

As no such notice has been served on the plaintiff, he is not barred of his right in and to the premises, and his right to pay the tax and redeem the land is wholly unaffected. The conclusion of the learned judge, therefore, that the defendant is entitled to the possession of the premises, and may lawfully hold and enjoy the same against the plaintiff for the term of sixty years, and the judgment entered thereon, is erroneous.

The next question to be determined is, whether the finding of the learned judge, and his conclusion there-

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on, that neither the plaintiff nor those from whom he claimed had been in the actual possession of the premises for three whole years before the commencement of this action, was correct. The only interruption of the plaintiff's possession, upon which the result is reached that neither he nor those through whom he held had been in possession for three whole years before the commencement of this action, was for three months, in the early part of the year 1877. The defendant, after obtaining the lease from the comptroller, went upon the premises, and told the tenants that he was the owner, and that they must pay rent to him. The tenants were threatened that unless they paid rent to the defendant, they would be expelled from the premises. Under such circumstances and threats, the tenants, for three or four months in the fore part of the year 1877, paid rent to the defendant. Since that time they have again recognized the plaintiff's title, and have regularly paid him rent, as they had done before they were interfered with by the defendant.

We cannot think that the defendant was entitled to enter into the occupation of the premises, or to the rents and profits thereof, until after his title had become perfected and absolute, in pursuance of the provisions of sections 15 and 16 of the act under consideration.

The rights conferred by the 4th section are dependent upon the performance of the acts required to be done by the holder of the lease, by the sections above named, and the omission of the owner to redeem in pursuance of the six months' notice. The penalty of forty-two per cent., imposed by section 13, must be regarded as ample compensation, allowed by law, for the delay of six months from the service of the notice to redeem, before the grantee should acquire all the rights, among which is possession, incident to a perfected and absolute title. The defendant's act in entering upon the

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premises, and in this manner collecting rents from plaintiff's tenants, we do not think, in law, should be held an interruption of the plaintiff's possession.

It is provided by statute that no entry shall be made into any lands, or other possessions, but in cases where entry is given by law (2 *R. S.* 507, § 1). And the attornment of a tenant to a stranger is absolutely void, and shall not in any wise affect the possession of his landlord, unless it be made with the consent of the landlord, or in pursuance of a judgment at law, or the order or decree of a court of equity, or to a mortgagee after a mortgage has become perfected (1 *R. S.* 744, § 3). The defendant's action did not in law interrupt the plaintiff's possession, under his deed of June, 1876 (*Burhans v. Van Zandt*, 7 *Barb.* 91).

The plaintiff and Thorp, through whom he claimed, had together a three years' possession of the premises prior to the commencement of the action, and the defendant did not obtain any title by means of the lease, for the reason that it was void, and if not void, it never became a perfected instrument sufficient to cut off or bar the plaintiff's right and interest under his deed.

The motion made by the plaintiff against Artemus Cady, clerk of arrears in the supreme court, for a mandamus, is no bar to this action, for the reason that it is not a proceeding between the same parties, and was not for the same relief sought in this action.

The judgment is reversed, and a new trial is ordered, costs to abide the event.

SEDGWICK, J., concurred.

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FRANCIS MORRIS AND ZACHARIAH E. SIMMONS, PLAINTIFFS AND APPELLANTS, v. WILLIAM H. WEBB, DEFENDANT AND RESPONDENT.

TRUSTEE.

Where a note was drawn payable on demand, and indorsed over and delivered to the defendant, who thereupon executed and delivered a receipt for the same, whereby he acknowledged that the note had been so indorsed and delivered to him "*to hold the same and the proceeds thereof, to secure, indemnify and save harmless the plaintiff for being sureties for the payees of the note, &c.,*"—*Held*, that the defendant occupied a trust relation towards the plaintiffs and the payee of the note; the extent of his trust, however, being limited by the terms of the receipt and the resolution of the directors of the payee of the note.

He was bound or under a duty, to hold that note, and its proceeds, if paid to him, for the benefit of plaintiffs.

As there was testimony in the case tending to show that he did not hold the note in his possession and under his control continuously, and also that he considered and stated that the note had been paid,—*Held*, that the dismissal of the complaint by the court below, without any explanation of these acts and statements of defendant, that seemed to be in violation of his duty as trustee, was erroneous, for the plaintiffs had established a cause of action.

Before VAN VORST and SPEIR, JJ.

Decided May 16, 1879.

Appeal from a judgment dismissing the complaint.

William D. Hennen, counsel, for plaintiffs and appellants.

William Allen Butler and *John K. Porter*, for defendant and respondent.

BY THE COURT.—VAN VORST, J.—The plaintiffs be—
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came sureties on an undertaking to discharge an attachment in an action brought against the Central American Transit Company. For their indemnity they held two steamships of the company, the *America* and the *Moses Taylor*. Subsequently, the affairs of the company not being prosperous, an arrangement was projected by and between the Transit Company and another corporation, the North American Steamship Company, by which the former company agreed to sell to the latter its steamships and other property for the sum of \$600,000.

The title to the two steamships above mentioned was in the plaintiffs.

The plaintiffs declined to part with the steamships unless they were indemnified against the liability which they had assumed by becoming sureties on the undertaking in the suit in which the attachment was issued, and which was then pending and undetermined. Plaintiffs claimed that \$40,000 of the \$600,000, which was agreed to be paid for the property of the Transit Company, should be set aside for their ultimate indemnity.

After some negotiation, it was finally arranged and agreed that a note for \$40,000 should be given by the purchasing to the selling company, and that the same should be placed in the hands of the defendant, to be held by him for plaintiffs' indemnity.

Such note was accordingly made and delivered to the Transit Company, signed, on the behalf of the purchasing company, by the defendant as its president. The note was drawn payable on demand, and was, by the treasurer of the Transit Company, the payee thereof, indorsed over and delivered to the defendant, who thereupon executed and delivered a receipt to the Transit Company, in and by which the defendant acknowledged that the note had been indorsed over and delivered to him "to hold the same and the proceeds thereof, to secure, indemnify and save harmless"

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the plaintiffs, for being sureties to release the property attached. The note and receipt were dated April 23, 1876.

The American Transit Company had, by a resolution adopted by its board of directors, dated the same day, resolved to accept the note as part of the consideration money for the property in question sold to the North American Steamship Company, and had authorized and directed the same to be indorsed to the defendant, and had empowered and directed him to hold the same and the proceeds thereof (but without personal liability, except for fraud and willful negligence), for the purposes mentioned in the receipt signed by the defendant. The arrangement, consummated by the delivery of the note to the defendants as their security, was satisfactory to the plaintiffs, and in reliance upon the same the plaintiffs executed transfers of, and delivered the two steamships to the purchasing company. The defendant's receipt, executed upon the delivery to him of the note for \$40,000, was at the time shown to the plaintiffs.

The learned judge below decided that the resolution of the directors of the Transit Company, and the defendant's receipt, imposed upon him no duty to collect the note in question.

But he did certainly occupy a trust relation towards the Transit Company and the plaintiffs, the extent of his engagement, however, being limited by the terms of the resolution and receipt.

Although he may not have been under any duty to enforce by affirmative action the payment of the note, which was payable on demand, without positive direction from those interested in its collection, yet he was under a duty to hold the note, and, when received, its proceeds.

Did he do that? According to his own testimony, he at once delivered the note to the treasurer of the

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purchasing corporation, of which he was president, and the same was kept and retained by him until after the North American Steamship Company became insolvent, and it was afterwards found among the papers of the receiver of that corporation. The treasurer of the purchasing corporation testified, however, that the note was in the defendant's possession, in his private office in Lewis street, for a time, and was then brought down by the defendant to the office of the company, and was placed in his hands.

Payments were made by the purchasing corporation on account of the \$600,000, the consideration agreed to be paid for the steamships and other property, until the whole amount was, in fact, paid.

The defendant was the president of the purchasing corporation, and was, for a time at least, the president of the Transit Company, and the active duty of managing the affairs, and adjusting the concerns of the former company largely rested upon him. The defendant was acquainted with all the facts and circumstances which entered into the creation of the note, and agreed to take the attitude of trustee in the premises. He knew the straitened condition of both companies, and that the Transit Company had parted with all its property, and that the purchasing company needed funds to carry on its business. He frequently came to its aid with his own means to a very large amount. It must have been present to his mind that the plaintiffs' only effective means of indemnity against loss occasioned by their becoming sureties for the Transit Company was through the note, reserved to meet it.

The evidence shows that he did feel some responsibility about the payment of the note, and that his trust with respect thereto should be discharged, and his knowledge of the affairs of both companies, and his active relation thereto, imposed some responsibility.

In one or more interviews with the treasurer of the

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purchasing company, to whose care he had intrusted the note, the treasurer stated that \$40,000 of the sum agreed to be paid for the property of the Transit Company ought to be set aside, and held to meet the note. The defendant replied that there was no immediate need for that, but that he had to take care of the interest on the note before the entire amount of \$600,000 should be disbursed.

It appears that this whole sum has been, in fact, paid by the purchasing corporation to and for the use of the Transit Company, subsequently to the purchase. The defendant, however, testified that the note in question has not, in fact, been paid, and it was produced upon the trial in its original condition.

But the person who acted as treasurer of the company testified that in statements, made by the defendant, of the condition of the company, to the directors, the note was entered as paid. This testimony we do not understand to be denied.

Such statements, made by defendant, who had the principal control and charge of the affairs of the company, and whose signature to checks for the payment of money was necessary, would suggest to the directors that it was not necessary to set aside specific funds to meet the obligation, which appeared by the statement to be satisfied.

If the note was not, in fact, paid, we cannot but think that the rendering of such statements to the directors by the defendant was a breach of duty towards the plaintiffs and the Transit Company. It was prejudicial to the interests of the plaintiffs, for whose indemnity the defendant held the note.

We are not prepared to say that, by the simple delivery of the note to the treasurer of the purchasing corporation, who was also the secretary or agent of the defendant, the defendant lost control of the note. He could at any time have resumed possession, if it had

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not, in fact, been paid. But such fact, in connection with the rendering of statements, showing that the note was paid, give some color to the idea that the note was treated by the defendant and the steamship company as paid.

We do not consider that such statements, unless the note was actually paid, are consistent with such holding of the note for the plaintiffs' indemnity as the defendant's obligations under the resolution of the directors of the Transit Company and his own receipt clearly imposed.

When the plaintiffs rested their case, the learned judge dismissed the complaint upon the plaintiff's evidence, no explanation having been given of these alleged statements in respect to the note.

We think that such disposition of the case was erroneous, and that the complaint was improperly dismissed. The plaintiffs' case established a cause of action.

Judgment reversed, and new trial ordered, with costs to abide the event.

SPEIR, J., concurred.

MORRIS K. JESUP, ET AL., PLAINTIFFS AND RESPONDENTS, v. ANDREW CARNEGIE, ET AL., DEFENDANTS AND APPELLANTS.

SECURITY ON APPEAL.—WAIVER.

The defendants, pending this appeal, deposited, under stipulation, bonds to an amount less than that specified by the Code as security in such cases. *Held*, that they thereby waived all right to the exercise of the discretion of the court, in limiting or reducing the amount of security.

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Before SEDGWICK and VAN VORST, JJ.

Decided May 16, 1879.

Appeal from order, denying motion made, by four defendants (joint judgment having been rendered against them, with others), to limit amount of security to be given upon their appeal.

Lewis Sanders, for appellant.

A. W. Everts, for respondent.

PER CURIAM.—The respondents move upon affidavits to dismiss this appeal. The affidavits show that while this appeal was pending, all the defendants were permitted by stipulation to deposit and did deposit bonds to an amount less than the amount of security specified by the Code. By so doing, these defendants have finally disposed of the subject-matter of appeal, and have waived any right they might have had, to claim that the discretion of the court should be exercised on their behalf, by reducing or limiting the amount of security.

The motion to dismiss appeal is granted, with \$10 costs and disbursements, if any, to be taxed.

GEORGE WEBB, PLAINTIFF AND APPELLANT, v.
JAMES P. FOSTER, ET AL., DEFENDANTS AND
RESPONDENTS.

SHAM ANSWER.—MOTION TO STRIKE OUT.

A pleading upon information and belief cannot be stricken out as sham, unless it clearly appears that there could not have been any information or belief.

The principles stated in *Wayland v. Tyson* (45 N. Y. 281), and *Thompson v. Erie R. R. Co.* (45 Id. 468), prevent an affirmative defense being stricken out as sham upon affidavits.

Opinion of the Court, by SEDGWICK, J.

Before SEDGWICK and SPEIR, JJ.

Decided June 13, 1879.

Appeal from order, denying plaintiff's motion to strike out, as sham, the separate answer of the defendant Foster.

O. E. Branch, for the appellant.

Thomas F. Wentworth, for the respondent.

BY THE COURT.—SEDGWICK, J.—The action was for rent. The answer, among other defenses which it is unnecessary to set out, pleaded, on information and belief, payment by the co-defendant, James Sperry.

The affidavits on which the motion was made did not show at all that at the time the answer was made, that it could not have been true that the defendant Foster had not been informed, and did not and could not believe, that his co-defendant had paid the rent. The Code declares that an averment may be made upon information and belief, to put the fact in issue. Such a pleading cannot, in the nature of things, be stricken out as sham, if, at least, it is not clearly shown that there could be no information or belief.

As to the fact of the co-defendant's not having paid the rent, the affidavits did not so convincingly or indisputably show the non-payment, that a court could determine that there could be no question for the jury, if the action were tried.

I further agree with the learned counsel for the respondent, that the principles stated in *Wayland v. Tyson* (45 *N. Y.* 281), *Thompson v. Erie R. R. Co.* (45 *Id.* 468), prevent an affirmative defense from being stricken out as sham upon affidavits. If it could, there would be no reason why a defendant should not have the right to strike out a complaint as sham.

Opinion of FREEDMAN, J., at Special Term.

Order affirmed, with \$10 costs, and disbursements to be taxed.

SPEIR, J., concurred.

JOSEPHINE S. DOUGLAS AND JENNIE S.
TWEED, PLAINTIFFS AND APPELLANTS, v. THE
KNICKERBOCKER LIFE INSURANCE COM-
PANY, DEFENDANT AND RESPONDENT.

LIFE INSURANCE POLICY.

A condition to the effect that if the party whose life is insured, shall, without the written consent of the company, travel upon the seas, or pass beyond the civilized settlements of the United States (excepting the British Provinces, &c.), the policy should be void, is an important condition, and if violated, the contract is terminated between the parties by its own limitation, unless continued in force by some other provision, or by the waiver of the violation by the insurance company (*Hathaway v. Trenton Mutual Life & Fire Ins. Co.*, 11 *Cush* [Mass]. 448; also *Nightingale v. State Mutual Life Ins. Co. of Worcester*, 5 *R. I.* [2 *Ames*] 88).

The principles controlling the construction of "endowment policies," and the rights of the beneficiaries thereunder, fully considered in the opinion at special term.

Before SEDGWICK and SPEIR, JJ.

Decided June 18, 1879.

Appeal from judgment at special term.

• *Robert Sewell* and *A. B. Conger*, for appellants.

Henry W. Johnson, for respondent.

PER CURIAM.—Judgment affirmed, with costs, upon the opinion of FREEDMAN, J., at special term.

The following is the opinion of the court at special term:—

Opinion of FREEDMAN, J., at Special Term.

FREEDMAN, J.—By the terms of the policy and in consideration of the premium of \$1,180.90 paid, and of the annual premium of a like sum to be paid on or before October 1, at noon, in every year during the continuance of the policy, the defendant assured the life of William M. Tweed of New York, in the amount of \$10,000, for the benefit of the plaintiffs, his daughters, share and share alike, and in the case of the death of either or both, the portion belonging to the deceased child or children to pass to Mary J. Tweed, the wife of said William M. Tweed. In case of the death of William M. Tweed before April 3, 1878, the defendant stipulated to pay the amount insured to the beneficiaries as stated, but in case he should be alive on that day, the amount was to be paid to him, whereupon the policy should be void. This policy was issued and accepted upon the express conditions enumerated therein, that if the party whose life was thereby insured should, without the written consent of the company previously obtained, travel upon the seas (except in voyages between coastwise ports of the United States), or should pass beyond the civilized settlements of the United States (excepting into the settled limits of the British Provinces, of the two Canades, Nova Scotia, New Brunswick), the policy should be void, null and of no effect.

It is upon an alleged violation of this clause that the defense mainly rests; for the defendant has shown by testimony, which was not controverted, that Wm. M. Tweed, after having, on the 4th of December, 1875, escaped from the custody of the sheriff of the city and county of New York, was, during the year 1876, found in the port of Vigo, in Spain, a distance of about 3,500 miles from New York, where he had gone without defendant's consent; and that, on September 26, 1876, he was, at said port, placed on board the United States

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man-of-war *Franklin*, and subsequently brought back to New York on said vessel as a prisoner.

Upon this state of facts there can be no doubt that an important condition upon which the policy had been issued and accepted was violated, and that in consequence thereof the contract between the parties came to an end by its own limitation, unless continued in force by some other provision, or by defendant's waiver of the violation.

There is no evidence of any waiver. It has been argued, however, that because the policy states that written permits, signed by the president or secretary of the company, will be granted on reasonable terms, for persons insured in said company to make voyages to any foreign country, equity will relieve against the violation. The answer to this proposition is, that the granting of such a permit, upon terms to be prescribed by the company, involves a new bargain to be entered into by the parties to the original contract, which the court cannot make for them. As matter of law, the company has a right to determine each application for a permit upon its own facts, and with special reference to the additional risk to be incurred (*Rainsford v. Royal Ins. Co.*, 1 *Jones & S.* 453; affirmed, 52 *N. Y.* 626). Nor is there any evidence showing upon what terms Tweed would or could have obtained a permit, if he had applied for one, or that the company had or has a uniform rule upon the subject. Under these circumstances the company cannot, at this late day, be adjudged liable to execute a permit *nunc pro tunc* upon such terms as to the court may seem reasonable.

Thus, in *Hathaway v. Trenton Mutual Life & Fire Ins. Co* (11 *Cush. [Mass.]* 448), the condition of the policy was that it should be void and of no effect if the assured, without defendant's consent, previously obtained and indorsed upon it, should pass beyond the settled limits of the United States. In returning from

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California he did go beyond those limits, and the court held that the policy was thereby rendered invalid, and the defendant discharged from all liability upon it, unless the company did give its consent that he might do so. It then appeared that the assured had permission to make one voyage to California and home in a first-rate vessel, round Cape Horn or by Vera Cruz; but it also appearing that the assured had returned home by way of Panama and Chagres. The court held that the consent given was not a general license, but a carefully-defined and restricted permission; that in giving it, the company had a right to fix its own terms and to circumscribe it within such limitations as it deemed expedient; that, as given, it restricted the assured to the two routes named; and that, having chosen to return by neither, but by a third, not embraced in the consent, there was a breach of the condition of the policy which rendered the policy void, although there was then no usually-traveled route by way of Vera Cruz, and although he may have returned the shortest and safest way.

In *Nightingale v. State Mutual Life Ins. Co. of Worcester* (5 R. I. [2 Ames] 38), the policy fixed the limits of constant residence of the assured within certain States of the United States, with the privilege to travel or be in others upon certain conditions. One of these conditions was that if the assured should, without the consent of the company first had and indorsed upon the policy, go into any of the States prohibited between July 1 and October 15 of any year, and remain therein more than five days, the policy should become void, and all payments thereon should be forfeited to the company. The policy further provided that "in case of forfeiture from the above or any other cause, the party interested shall have the benefit of such equitable adjustment as may from time to time be provided by the board of directors." The assured went

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into one of the prohibited States, in violation of the provisions stated, and after remaining therein ten days, was attacked by apoplexy and died. The proof showed that such violation did not contribute to the death, and it was claimed that the policy upon its face held out an express promise of an equitable adjustment, in case of forfeiture from the alleged or any other cause. But the court held that it had no power to interfere with the action of the directors, or to dispense with or qualify the forfeiture of the policy, according to its own notions of what would be an equitable adjustment under the circumstances.

The policy in the case at bar also provides that the omission to pay the annual premium on or before 12 o'clock at noon on the day or days mentioned therein for the payment thereof, shall then and thereafter cause said policy to be void, without notice to any party or parties interested therein. One of the conditions printed upon the back of the policy reiterates this requirement; and by still another clause contained in the body of the policy it is provided, that if it shall be found that the conditions printed on the back thereof have been violated, the policy shall be void and of no effect, either to the insured, insurer, or any party to whom this policy may be assigned, and all the premiums paid thereon shall be forfeited to the company. But upon the back of the policy the following further stipulation appears: "It being understood and agreed that if, after the receipt by this company of not less than three or more annual premiums, this policy should cease in consequence of the non-payment of premiums, then, upon a surrender of the same, the company will issue a new policy for the full value acquired under the old one, subject to any notes that may have been received on account of premiums—that is to say, if payments for three years have been made, it will issue a policy for three-tenths of the sum origin-

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ally insured; if for four years, for four-tenths, and in the same proportion for any number of payments, without subjecting the assured to any subsequent charge, except the interest annually on all premium notes remaining unpaid on this policy."

From the fact that this stipulation appears at the foot of all the conditions, and that it was indorsed upon the policy in red ink, and separately signed by the president and secretary of the defendant, the learned counsel for the plaintiffs very ingeniously argued that the contract of life insurance under consideration was in part with the person whose life was insured and in part with the beneficiaries named in the policy, and that, as between them and the company, it was divisible, so that, after the payment of the third annual premium, the contract could not be terminated by the company for a violation by the person whose life was insured, of any of the conditions, except on notice to the beneficiaries. No such notice having been given, it was further argued that the policy continued in force up to October 1, 1876, and that on that day the beneficiaries were in a position to elect to omit the payment of the premium falling due upon that day, and to demand a new policy for the full value acquired under the old one, without further charge, there being no outstanding notes for premiums given by them or the assured.

To test the soundness of this argument, I have made quite an extensive and critical examination of all the conditions of the contract of insurance, and their bearing upon one another, as well as their collective force and effect. Some, as already stated, are contained in the body of the policy, and the remainder, partly by way of reiteration and partly by way of explanation and qualification, are printed under the general title of "Conditions of Insurance" upon the back of the instrument. But the latter are referred to in the body

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of the policy as constituting part of the same, and hence all of the conditions are to be treated as if they appeared in their appropriate places in the body of the instrument. Considered with reference to their general legal effect, some bear the character of conditions precedent, or active conditions, the performance of which is essential to give a right of action, while others, being of a restrictive character, declared the instances on the occurrence of which the policy was to become void. The breach of the latter discharges the liability, when once created by the performance of the active conditions. Upon the foot of all is the saving clause in favor of the continuance of the policy after the receipt of at least three annual premiums.

But this clause is available to the person whose life is insured as well as to the beneficiaries. It is not a separate contract, because, standing by itself, it has not sufficient meaning, nor is it capable of separate execution or enforcement. It was manifestly designed to be a part of the original contract, since it refers to the policy in express language, and by its express language it was to bind the company only in case the policy ceased in consequence of the non-payment of premiums.

Time and space do not permit me to discuss the other conditions more fully than I have done. It is sufficient to say that nothing can be found in them or any of them which warrants the conclusion that there was a contract with the beneficiaries separate and apart from that made with the person whose life was insured, or that they acquired any vested rights after the payment of the third annual premium, which could not be divested by a subsequent breach of a condition not covered by the saving clause, or that they were entitled to notice of the election of the company to treat the policy as at an end in case of a violation of any of its conditions not embraced in the clause last referred to.

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The policy, and all the conditions contained in and upon it, together constitute the contract, and only one contract, upon which the rights and liabilities of all parties depend.

Taken as a whole, therefore—and the only safe rule, after all, is to always take the whole contract as written, subtracting nothing therefrom, adding nothing thereto—the general plan and scheme of the policy and the plain intent of the contracting parties was that, if after three annual payments had been made, the policy should lapse in consequence of the non-payment of premiums falling due, the company should not be in a position to enforce the absolute forfeiture of all the premiums received, provided all the other conditions upon the observance of which the life of the policy depended had been complied with. But in case any of these other conditions had been violated, the policy should become null and void, without notice to any of the parties interested. The liability of the company could become absolute only on the happening of a certain event, and not even then unless the assured had done certain acts and had refrained from doing certain others. What he was required to do and what he was prohibited from doing, were conditions of liability agreed to by all parties in interest, and no court has the right to impose other or additional ones. Such conditions are essential parts of the contract. They qualify the entire contract, and upon a violation of any of the prohibitory clauses, the contract by its terms becomes *ipso facto* void (Evans v. United States Life Ins. Co., 6 Supm. Ct. [T. & C.] 331; Rainsford v. Royal Ins. Co., 33 N. Y. Super. Ct. [J. & S.] 453; affirmed, 52 N. Y. 626; Ritzler v. World Mut. Life Ins. Co., 42 N. Y. Super. Ct. [J. & S.] 409; Foot v. Ætna Life Ins. Co., 61 N. Y. 571).

Plaintiffs sue as assignees of Tweed and as beneficiaries named in the policy. According to the proofs

the eight annual premiums that were paid were paid by them. It may be a great hardship for them to find that the whole of these payments were made in vain, and that the policy which is labeled as an endowment policy wholly failed to secure for them any endowment whatever. Indeed, to call a policy like the one in question an endowment policy is a misnomer; but the court can only carry into effect the contract as they made it, and, as thus made, they stand in no better position than Tweed would have stood if he had brought the action. The courts cannot make contracts for the parties, nor alter or vary those made by them. The law, it is true, frequently supplies, by its implications, the want of express agreements between the parties; but it never overcomes, by its implications, the express provisions of the parties. If these are illegal, the law avoids them; if they are legal it yields to them, and does not put in their stead what it would have put if they had been silent. The plaintiffs, even if they be regarded exclusively in the light of beneficiaries, chose Tweed as the subject of risk under certain conditions which they agreed to accept; he violated them, and his breach is their breach. By such breach the policy, by its express terms, became null and void.

The policy having come to an end in consequence of Tweed's flight to Spain without the consent of the company, it is not necessary to examine whether or not his return to New York on board the *Franklin*, which made the journey by a circuitous route, partly by steam and partly under sail, violated another provision of the policy, which required that the party whose life was insured, when traveling, should proceed by the usual mode of conveyance for travelers.

In any aspect of the case the policy ceased to exist by Tweed's travels upon the ocean to reach Spain; and hence, on October 1, 1876, there was no policy in force on which the premium could be paid. It had become

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null and void, and it could only be revived by the mutual agreement of the parties. No such agreement having been made, and there being no waiver of the violation, the plaintiffs could not, by electing on October 1, 1876, to omit to pay the premium due on that day, impose upon the defendant the liability to issue a new policy for eight-tenths of the sum originally insured. Even if it could be done, the new policy would be in the same form as the old one, and consequently it would be broken the moment it was given.

The defendant is entitled to judgment dismissing the complaint, with costs.

**DANIEL CARPENTER, PLAINTIFF AND RESPOND-
ENT, v. HARRY A. ALLEN, DEFENDANT AND
APPELLANT.**

ATTORNEY.—AUTHORITY OF, TO COMMENCE AN ACTION, &c.

On a motion of defendant, that the summons and complaint, in an action, be dismissed, on the ground that the attorneys for the plaintiff had not sufficient, or any authority, to institute the action in behalf of plaintiff, it appeared from the motion papers, that defendant had previously obtained an order in the same action, that plaintiff's attorneys show cause why they should not be compelled to produce their authority from the plaintiff for commencing this action; that on the return of said order to show cause, the affidavit of the plaintiff was filed and read, in which plaintiff stated in substance that he had instructed the attorneys who appeared in his behalf to bring the action in his name against the defendant, and said authority was deemed sufficient by the court and so declared by its order.

The court held, on this motion, that in the former proceedings this court had declared that sufficient authority for the commencement of this action, by the plaintiff's attorneys, appeared in the affidavit of the plaintiff; that such adjudication was final until reversed on appeal; and that it cannot be reviewed on this motion, subsequently made in this action.

Appellant's Points.

Before SEDGWICK and FREEDMAN, JJ.

Decided June 13, 1879.

Appeal from an order denying defendant's motion to dismiss complaint, upon the ground that the attorneys of record for the plaintiff had not at the time of the commencement of this action any sufficient authority, or any authority, to institute the said action, in behalf of said plaintiff.

Harvey A. Allen, defendant and appellant, in person, urged:—I. The attorney shall have a written request from the plaintiff, or his agent, to commence the action, or a written recognition of the authority of the attorney to commence the same (2 *R. S.* 306). Said attorneys did not possess such request, nor do they produce any such recognition.

II. No general retainer to attend to the business of the plaintiff is sufficient; it must be specific (*Howard v. Howard*, 11 *How. Pr.* 80). Hence, it must be given for a special purpose at a proper time therefor, for the purpose of bringing the action, and before the commencement of the action.

III. Plaintiff in his affidavit states "and I have instructed them (my attorneys) to bring an action to eject." When? On that day, and by that instrument; that is to say, January 11, 1879. Plaintiff does not say, this action was brought by my direction; had he said in such affidavit—I instructed them to bring this action, the authority would be full, but "to bring an action," can only be construed to apply to the future, and cannot be considered as giving them authority to have brought this action at the time they did. If the authority produced does not assume whatever has been done in the premises, it should antedate the action. Full assumption of the acts heretofore had has been held sufficient in the single case cited, and the only

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one reported (see *Howard v. Howard, supra*). But in the affidavit herein produced there is no such plenary assumption. Plaintiff simply directs for the future; that is to say, from and after January 11, 1879, and his affidavit does not relate back in any way, and cannot be so construed. Where the requisite is a statutory one, nothing can be presumed in favor of the authority produced; it must appear on its face that the attorneys were authorized to institute the action at the time it was commenced. Hence, the service of the summons and complaint by the said attorneys, assuming to be for the plaintiff, was not for him, was entirely without adequate or any authority whatever, and was a naked assumption by them of unauthorized power.

Man & Parsons, attorneys, and *William Man*, of counsel, for respondents, urged:—I. It was not necessary that the attorneys should have any written authority to commence the action. The provision of the statute is alternative; it is sufficient if the attorneys produce, 1. Any written request of the plaintiff to commence the action; or, 2. Any written recognition of the authority of the attorneys, duly proven, &c. (3 *R. S.* 6 ed. 573, § 15). The affidavit of plaintiff that he had instructed *Man & Parsons*, his attorneys, to bring this suit to eject the defendant, and that he had directed the action to be brought in his own name, was ample evidence of the authority of the attorneys, by way of “recognition” of their authority (*Howard v. Howard*, 11 *How. Pr.* 82).

II. The authority in question had already been adjudged sufficient by the order of January 18, 1879, which states the authority produced and in question, to be “the authority asked for by defendant, given by plaintiffs to his said attorneys.” No appeal was taken from this order.

BY THE COURT.—SEDGWICK, J.—The action was in

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ejectment. The motion was made upon the ground, as stated in the notice, that the attorneys for plaintiff "had not, at the time of the commencement of the action, any sufficient authority, or any authority, to institute this action on behalf of said plaintiffs."

Before such motion was made, the defendant had obtained an order that the attorneys for plaintiff show cause why "they shall not be compelled to produce their authority from the plaintiff for commencing this action," staying proceedings in the meantime.

On the return day of this order, an affidavit of the plaintiff was produced, made after the action was begun, which stated: "I have instructed Man & Parsons, of 56 Wall street, New York city, my attorneys, to bring an action to eject, from the said premises, Harvey A. Allen," "and I have directed that such suit should be brought in my name, as plaintiff." An order was thereupon made, reciting the order to show cause, and continuing, "now, on producing and filing the said authority asked for by the defendant, given by said plaintiff to his said attorneys, the order is hereby confirmed."

This order was not appealed from, but subsequently the present motion was made, on the ground that the authority produced was not sufficient, under 2 R. S. 2 ed. p. 314, § 20, which is "any written request of such plaintiff or his agent, to commence such action, or any written recognition of the authority of the attorney to commence the same, duly proved by the affidavit of such attorney or other competent witness, shall be sufficient presumptive evidence of such authority." But it is manifest that the court, in proceeding upon the order to show cause, had once declared that there was sufficient authority in the affidavit of the plaintiff that had been produced. This adjudication was final until reversed, and could not be reviewed upon the motion for the order now appealed from.

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If the court had been called upon to look at the character of the authority, it must have been held sufficient. It was a reasonable inference, that when the plaintiff swore that "I have instructed," and "I have directed that such suit shall be brought," he referred to this suit, as already to his knowledge brought.

Order appealed from affirmed, with \$10 costs, and disbursements to be taxed.

FREEDMAN, J., concurred.

JOHN CONROY, PLAINTIFF AND RESPONDENT, v.
FELIX CAMPBELL, DEFENDANT AND APPELLANT.

COPARTNERSHIP.

Where, by the terms of the agreement, the defendant furnished the capital stock, and the plaintiff contributed his skill and service, and the profits of the copartnership were to be equally divided, the plaintiff is not entitled to any part of the capital stock, on a settlement of the affairs of the partnership. He has no interest in any part of the capital excepting so far as, in the progress of the business, the same may have been converted into profits.

Before SEDGWICK and FREEDMAN, JJ.

Decided June 13, 1879.

Appeal from judgment for plaintiff.

John Hardy, for appellant.

A. P. Hinman, for respondent.

BY THE COURT.—SEDGWICK, J.—The complaint alleged that the parties had entered into a copartnership, which was to be for the term of three months ;

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that the capital was stock furnished by the defendant; that the plaintiff's contribution to the capital was his skill and services; that the plaintiff was to be paid one-half of the profits; that the business continued for two weeks; that at the end of that time the defendant sold the stock to a third person, and stopped the business of the copartnership. The complaint thereupon claimed an accounting of the profits, and a judgment for the amount that should appear due to him, and also for the damages to plaintiff for breaking up the business and depriving him of its profits for the remainder of the three months. The plaintiff had judgment for an amount of profits as due him, and also for damages.

The judgment proceeds upon the propositions that the plaintiff had an interest in the stock, and also that the defendant was responsible for the sale of the stock, and putting a third person in possession, which stopped the business. As to the first, there was no agreement that the plaintiff should have any part of the capital, consisting of the stock. He was, therefore, not entitled to any part, excepting so far as, in the progress of the business, it might be converted into profits. As to the second, I can find no evidence whatever that the defendant had part or lot in the transaction, by which the third person was put in possession of the stock and place of business. It seems to have been the sole act of the defendant's brother, and there was no evidence that the defendant, in any manner, acted with his brother or aided him. The case made it quite as much of a wrong and harm to the defendant as to the plaintiff. The defendant was not, therefore, liable for any damages for breach of the partnership agreement. On the facts, then, the plaintiff was entitled only to his share of the profits actually made. There were no debts. The partnership had earned, according to plaintiff's testimony, at the most \$37.50 profits. One-

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half of this, viz. : \$18.75, was plaintiff's. He received, however, \$20. The defendant should have judgment for the difference, viz., \$1.25. This seems to be the necessary result, after some doubtful matters of law and fact are determined in plaintiff's favor. There is no need of a new trial. Neither justice nor the parties' interests demand it.

The judgment should be set aside, and judgment entered for defendant in the sum of \$1.25, with the costs of this appeal, but no costs in the action generally.

FREEDMAN, J., concurred.

EMELINE PECKHAM, PLAINTIFF AND APPELLANT,
v. CORNELIUS D. VAN WAGENEN, DEFEND-
ANT AND RESPONDENT.

CORPORATION. — SHAREHOLDERS, THEIR RELATIONS WITH EACH OTHER.

A person claiming to be a shareholder of a corporation, and whose claim is not recognized by the corporation, must establish his claim and enforce recognition by an action directly against the corporation itself.

Where a dividend has been made and paid by a corporation among those whom it deems to be, and recognizes as, shareholders, one who claims to be a shareholder, but whose claim is not recognized or admitted by the corporation, cannot maintain an action against one of the recognized shareholders for a portion of such dividend.

Such claimant has no cause of action against the shareholder. The claim must be established against the corporation.

Before SPEIR and FREEDMAN, JJ.

Decided June 18, 1879.

Opinion of the Court, by FREEDMAN, J.

Appeal from judgment dismissing complaint.

Bristow, Peet, Burnett & Opdyke, attorneys, and
James Emott, of counsel, for appellant.

Burrill, Davison & Burrill, attorneys, and *John E. Burrill*, of counsel, for respondent.

BY THE COURT.—FREEDMAN, J.—The testimony shows that the only claim the plaintiff has to be recognized as a shareholder of the New York and Fort Lee Railroad Company rests upon a lost certificate, dated November 6, 1863, which was not executed by the company, but purported to have been given by order of a certain board of commissioners, whose duty it was at a certain time to take subscriptions for the stock of the company, and under which no application was ever made to the company for the issue of certificates of stock, in accordance therewith. Her claim is surrounded by many suspicious circumstances, and it has not been recognized by the company. The interpretation of the evidence most favorable to her leaves her, therefore, in the attitude of one whose claim to membership is contested by the company, upon grounds which require investigation. While occupying that position she has no standing as a shareholder, and can enforce no rights peculiar to shareholders, against third persons, recognized as such by the corporation. The money divided by the corporation belonged to the corporation. It was paid by the corporation to the defendant and his associates, in recognition of their right to receive it; and what they received, they received as their own. By such payment, the corporation was not discharged from its liability to the plaintiff, if the latter was entitled to share therein. In such a case the law does not imply a promise, on the part of the defendant, to refund the excess received to the plaintiff (*Patrick v. Metcalf*, 37 N. Y. 332; *Butterworth*

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v. Gould, 41 *Id.* 450). The case of *Hathaway v. Town of Cincinnati* is distinguishable upon the facts. In that case the State recognized the claim of the plaintiff (Town of Solon), as well as the claims of the other towns, to the bounty money, and paid the money over to the committee of the county supervisors, for the purpose of distribution among the towns, Solon included. The committee, therefore, received the money, charged with the trust of distribution, and the State was discharged from all claim of the town of Solon against it; and the money having been received to be paid over to Solon, was the money of Solon when the committee received it, and when it came to the hands of the defendant. It further appeared that the defendant received the money with notice of the claim of the town of Solon. In all these respects, that case differed from the two cases above cited, and from the case at bar.

If the transaction, resulting in the division of the money by the New York and Fort Lee Railroad Company among the shareholders, recognized upon the books of the company as such, and the mode of division, can be inquired into in the action as brought, it can be inquired into and passed upon in as many other actions as the plaintiff may see fit to bring against other shareholders. In every one of these the plaintiff would be bound to establish her right to membership as a part of her case; and yet, in case of success, not one of the judgments would be binding upon the corporation. Such a course might also result in verdicts conflicting as to the fact involved. The bare statement of these difficulties is sufficient to show that the action cannot be maintained as brought. The objection is not that there is a defect of parties defendant, who are jointly liable with the defendant sued, but that the plaintiff has no cause of action, at all, against the defendant.

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The complaint was properly dismissed, and the judgment appealed from should be affirmed, with costs.

SPEIR, J., concurred.

ARTHUR D. FISKE, PLAINTIFF, v. WILLIAM F.
HIBBARD, DEFENDANT.

STATUTE OF LIMITATIONS.

This statute, when applicable, is something more than presumptive evidence of payment. It is a complete bar to the recovery of the debt, and no admission of the debtor will avoid the discharge unless under circumstances that indicate an acknowledgment of the debt, and a willingness to pay the same.

An express promise to pay, however, is not necessary, when the same can be implied from the acknowledgment of a present indebtedness (*Kincard v. Archibald*, 10 *Hun*, 9; and affirmed in the court of appeals, April 2, 1878, and other cases cited in the opinion of the court).

In this case, the defendant wrote a letter to the plaintiff, which contained the following statements in regard to the debt in question:

"I am well aware that I owe you for money borrowed."

"As you have the figures, I wish you would at your leisure make out a statement of what you consider my indebtedness to you, and send it to me, resting assured that in all money matters I want to act honestly toward everybody."

Held, by the court, that these statements of defendant to plaintiff in that letter were a sufficient acknowledgment of a present indebtedness, and from which a promise to pay might be implied.

Before SPEIR and FREEDMAN, JJ.

Decided June 13, 1879.

This action was brought to recover the amount of certain loans made by Frederick S. Heiser to the defendant in 1868, and also to recover the amount of ad-

Opinion of the Court, by FREEDMAN, J.

vances made by said Heiser, in order to protect his interest in a certain lease assigned by the said defendant to said Heiser, as security for the greater part of said loan.

The defendant, by his answer, admits an indebtedness of a limited amount. As to the residue of the claim, he interposes the statute of limitations as a defense; but in case the statute shall not be held to bar a recovery, he claims that his indebtedness to Heiser was extinguished by the absolute conveyance of his interest in a certain lease of premises in the city of New York; and that such conveyance was not made by the defendant as security for a loan of \$5,000, as is insisted by the plaintiff.

Upon the trial, a verdict was rendered for the plaintiff, by direction of the court, for \$15,765.19, and defendant's exceptions were ordered to be heard at the general term in the first instance.

W. T. Schley, for the plaintiff.

M. S. Thompson, for the defendant.

BY THE COURT.—FREEDMAN, J.—Whether the real arrangement between the parties amounted to an absolute or a conditional sale, or was intended to be collateral security for loans already made, and a further loan to be made on the faith of it, depends upon the facts and circumstances surrounding the transaction. It was competent to show that the writings, though appearing, to a certain extent, absolute upon their face, were intended to stand as security merely. This proof the plaintiff furnished, and the defendant gave no testimony to the contrary. The court below was, therefore, right in determining this branch of the case in favor of the plaintiff.

I am also of the opinion that the defendant was

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credited with all moneys as to which he was entitled to credit.

The only remaining question arises upon defendant's exception to the ruling of the court that the plaintiff's claim was not barred by the statute of limitations. This ruling was based upon a certain letter, written by defendant to plaintiff, which was held sufficient to take the case out of the operation of the statute. It contains, among other things not necessary to be considered, the following statements, viz.:

1. "I am well aware that I owe you for money borrowed;" and

2. "As you have the figures, I wish you would, at your leisure, make out a statement of what you consider my indebtedness to you, and send it to me, resting assured that in all money matters I want to act honestly toward everybody."

The only objection urged against it relates to the sufficiency of the acknowledgment contained therein.

The statute of limitations, when applicable, is something more than presumptive evidence of payment of the debt. It is a complete bar. No admission of the debtor will avoid the discharge, unless made under circumstances which indicate a willingness to pay. But no express promise is necessary, as long as a promise may be implied from the acknowledgment of a present indebtedness (*Kincaid v. Archibald*, 10 *Hun*, 9; affirmed by the Court of Appeals, April 2, 1878; *McNamee v. Tenny*, 41 *Barb.* 495; *Ross v. Ross*, 6 *Hun*, 80; *Loomis v. Decker*, 1 *Daly*, 186; *Winchell v. Hicks*, 18 *N. Y.* 558; *Chace v. Higgins*, 1 *N. Y. Supm. Ct.* [1 *T. & C.*] 229; *Code of Civ. Pro.* § 395).

Considered in the light of these authorities, the letter in question contains a sufficient acknowledgment of an indebtedness then existing, to take the case out of the operation of the statute.

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Defendant's exceptions should be overruled, and judgment absolute rendered in favor of the plaintiff, upon the verdict, with costs.

SPEIR, J., concurred.

JULIA SCHMIDT, PLAINTIFF AND APPELLANT, v.
JOHN HEITNER, DEFENDANT AND RESPONDENT.

EXECUTION AGAINST THE PERSON.

Section 573 of the Code of Civil Procedure provides that an execution against the person must be issued within three months after entry of judgment, where the defendant is in *actual custody by virtue of an order of arrest* in the action.

A defendant released from the order of arrest in the action, and on bail, is not in *actual custody* within the true intent and meaning of the term, as used in the section referred to.

It seems that, in case of bail to the limits of the jail, a different rule prevails, for in such case the person is really imprisoned upon an execution, within the limits of the jail.

Before SEDGWICK and FREEDMAN, JJ.

Decided June 13, 1879.

Appeal from an order vacating and setting aside an execution against the body of the defendant.

The facts presented on the hearing of the motion were as follows :—

About May 21, 1875, an order of arrest was issued against defendant; defendant was arrested and immediately gave bail, and remained and was released on said bail ever since. On October 24, 1877, judgment was recovered and entered against defendant.

Execution against the property of defendant was returned January 9, 1878, unsatisfied.

Opinion of the Court, by FREEDMAN, J.

Execution against the person of defendant was issued October 21, 1878.

The court, by an order, vacated the execution against the person, on the ground that it had not been issued within three months after the entry of judgment, and the plaintiff appealed.

John P. Schuchman, attorney, for appellant.

David Levy, attorney, for respondent.

BY THE COURT.—FREEDMAN, J.—I do not see how the order appealed from can be sustained. Section 572 of the Code of Civil Procedure applies only to defendants in actual custody. A defendant released on bail is not in actual custody, within the true intent and meaning of the term, as used in the section referred to.

Section 288 of the former Code contained a similar provision, and, in *Bostwick v. Goetzel* (57 N. Y. 582, affirming 34 N. Y. Super. Ct. 23), was held inapplicable to the case of a defendant at large on bail. *Coman v. Storm* (2 How. Pr. 84) is not in point. In that case the defendant, though enjoying the liberties of the jail, was really imprisoned, upon an execution against his person, within the limits of the jail.

The order should be reversed, with costs, and the motion denied, with ten dollars costs.

SEDGWICK, J., concurred.

Opinion of the Court, by FREEDMAN, J.

SOLOMON LOEB, ET AL., PLAINTIFFS, v. THEODORE HELLMAN, ET AL., DEFENDANTS.

PRINCIPAL AND AGENT.

The rule that an agent cannot bind his principal in a matter in which the agent has secured to himself an interest, is well settled.

In such a case the principal may repudiate the act of the agent whenever the facts become known to him.

Loss occasioned by the negligence of the agent in the fulfillment of his duties, must fall upon the agent, and he is liable therefor to his principal.

This case was one of a special agency, under which the duty of seeing that the bills of exchange were fully covered by actual shipments of cotton, and the bills of lading were valid, was clearly imposed upon the defendants. Bills of exchange purchased by defendants for plaintiffs' account, otherwise than in strict accordance with their authority under this special agency, did not constitute a proper and legitimate charge, in favor of defendants against plaintiffs, unless it clearly appeared that such violation of duty had been waived by the plaintiffs. There being no proof of such waiver, the defendants were justly held liable.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided June 18, 1879.

Exceptions ordered to be heard at general term, in the first instance.

Man & Parsons, attorneys, and *John E. Parsons*, of counsel, for plaintiffs.

Lauterbach & Spingarn, attorneys, and *F. N. Bangs*, of counsel, for defendants.

BY THE COURT.—FREEDMAN, J.—I am of the opinion that the verdict was properly directed and that the views expressed by the learned judge in making the direction were, in the main, correct. The case was one

Opinion of the Court, by FREEDMAN, J.

of a special agency, under which the duty of seeing that the bills of exchange were fully covered by actual shipments of cotton and that the bills of lading were valid, was imposed upon the defendants; and under which bills of exchange purchased by the defendants for plaintiffs' account, otherwise than in strict accordance with their authority, did not constitute a proper and legitimate charge against the plaintiffs, unless the violation of authority was clearly waived by the plaintiffs. There being no proof of such waiver, the defendants were justly held liable.

The question really was, whether the defendants could compel the plaintiffs to reimburse them for advances which they, the defendants, had made to Carr & Laun at a profit exclusively to themselves. They had a strong interest to accomplish this, if possible, but this interest was directly antagonistic to the discharge of their duty to the plaintiffs. The rule that an agent cannot bind his principal in a matter in which he, the agent, has secured to himself an interest, is well settled. In such a case the principal can repudiate the act of the agent whenever the facts come to his knowledge.

But, even if the liability of the defendants depended upon negligence, the verdict that has been directed might have been directed against them upon that ground. The evidence showed that throughout they transacted the business in the most careless manner. They advanced the moneys received from the plaintiffs for the purchase of bills of exchange drawn against actual shipments of cotton, and to be accompanied by valid bills of lading, to Carr & Laun, on no other security than receipts from Carr & Laun, pledging cotton *to be* purchased, and containing Carr & Laun's promise of bills of exchange *to be* drawn in the indefinite future, and *to be* secured by the cotton that was *to be* purchased; and, when they received what purported to be

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bills of lading, they did not take the trouble to see whether such papers represented actual shipments of cotton. It was their negligence in these particulars which amounted to a breach of duty and occasioned the loss.

In either aspect of the case the defendants are liable to repay the amount of the bills of exchange, with interest.

The loss of the premium of insurance of \$504 on the cotton shipped by the *Flora* was also caused by a breach of duty, or negligence, on the part of the defendants. They were bound to secure satisfactory proof "of the actual effect of insurance." But, when they took the bills, neither was the cotton insured nor did they take the trouble to ask whether it was insured or not. This shipment having resulted in a loss, irrespective of the amount paid for insurance, the sum of \$504 is not chargeable against the plaintiffs.

Defendant's exceptions should be overruled and judgment ordered for the plaintiff, on the verdict, with costs.

SPEIR, J., concurred ; SEDGWICK, J., concurred, on the ground first stated.

JOHN W. PHYFE, PLAINTIFF AND APPELLANT,
v. PETER MASTERSON, ET AL., DEFENDANTS
AND RESPONDENTS.

EJECTMENT.—NEW TRIALS IN, UNDER THE STATUTE.

Where an ejectment case was tried before the court and jury, and a verdict rendered for plaintiff, and the court ordered that the entry of judgment be stayed, and that the defendant's exception be heard in the first instance at general term; and afterwards, at general term, the exceptions were overruled, and judgment for plaintiff ordered,—*Held*, that this judgment was entered upon

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the verdict of a jury, and is such a judgment as is described in 2 R. S. p. 309, tit. 1, part 2, c. 5, § 86.

Execution was issued on this judgment, for plaintiff's costs, and the sheriff sold, thereby, all the right, title and interest of the defendant, in and to the premises described in the complaint, and the plaintiff became the purchaser and received the sheriff's deed, and the plaintiff claims that the defendant lost all right, title and interest in the premises, by such sale and deed, and that the statute did not intend to give a new trial to a party who had no interest in the land, that was the subject of the action. Also, that the judgment was satisfied by the sale under the execution, and there was no judgment to be vacated under the statute.

Held, that such claims cannot be sustained. At the time the execution was issued, the judgment was conclusive that the plaintiff had the title to the land, and that the defendant had none. There was nothing in the way of rights or interests to sell, or that could be sold under the execution. The right to make the motion for a new trial in the action was not, in its nature, subject to levy and sale under execution, and was not in fact sold. The sheriff's deed conveyed to plaintiff no more than he possessed before, under the judgment.

But the Court also held, that it did not appear, by the motion papers for the new trial, that justice would be promoted, and the rights of the parties more satisfactorily ascertained and established by a new trial.

1. No specification nor any indication apparent in the moving papers, pointing out any error or injustice, other than a statement that the motion was made upon the affidavit annexed, and upon all papers, proceedings, and pleadings in the action. Such a notice is vague, and its general words concealed, rather than disclosed, what position was taken for the new trial.

2. The principles stated in *Wright v. Milbank* (9 Bow. 672), are applicable. It is not every error, even though it may be clear, that calls for second new trial. The defendant's case has been well considered before this motion was made. Any errors on the first two trials could have been corrected on appeal. In the motion for a new trial the second time, the discretion of the court is addressed and invoked to a certain degree.

The court must ascertain and determine that substantial justice requires the new trial demanded. It must further determine to what extent, if at all, the defendant is responsible for the court, on the former trial, having made the mistake, or omitted to consider the ground urged on this motion.

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If it appears that the defendant omitted to point out to the court, on the former trial, the matter now claimed as grounds for this motion, and that omission is not excused, or accounted for, but may have been intentional, then all the general principles of jurisprudence forbid that this should be considered a sufficient reason for a new trial, or that it will more satisfactorily establish the rights of the parties. Such an omission should be deemed a waiver of the objection for all future purposes in the litigation. The present objections are of a formal or technical character, and such as would have been meritorious, if taken at the right time, but are insufficient as grounds for a second new trial.

Before SEDGWICK and FREEDMAN, JJ.

Decided November 8, 1879.

Appeal from order granting defendant's motion for second new trial, under the statutes, regarding new trials in ejectment.

The action was in ejectment. The plaintiff claimed as lessee from the corporation of the city of New York, for the term of one thousand years, on a sale for unpaid taxes.

The defendant had, after the first trial, claimed and procured a new trial. The motion for the order appealed from was for a second new trial.

John Townshend, for appellant.

James A. Deering, for respondent.

BY THE COURT.—SEDGWICK, J.—The learned counsel for the appellant claims, that the judgment vacated is not of a kind that section 36 of 2 R. S. (p. 309, tit. 1, pt. 3, c. 5) describes, and that section 37, empowers the court to vacate. The ground of this claim is, that the judgment was rendered on the order of the general term, and not upon the verdict of a jury. This is erroneous. A verdict was given by the jury.

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The court at the trial ordered that the entering of judgment thereon be stayed, and that the defendants' exceptions be heard in the first instance at general term. The exceptions were overruled at general term, the order directing that the plaintiff have judgment on the verdict. When the plaintiff entered this judgment, it was, therefore, upon the verdict of a jury.

A further claim by appellant was that the defendant is not, under section 37, entitled to be an applicant for the order. That provides that the judgment may be vacated "upon the application of the party, against whom the same was rendered, his heirs and assignees." It is clear that the defendant was not his own heir or assignee. It is equally clear that he is the party against whom the judgment was rendered. It was shown on the motion, that execution was issued on the judgment for costs against the defendant, and the affidavit states that the sheriff, after due advertisement, sold the right, title and interest of the defendant in and to the premises described in the complaint; that the plaintiff became the purchaser, and after the due course of things, received the sheriff's deed of such right, title and interest. Therefore it is argued, that the defendant lost all right, title and interest to or in the premises, and that the statute did not intend to give a new trial to a man who had no interest in the land; and a further argument is, that the judgment, having been satisfied by the plaintiff's purchase and bid, cannot be vacated, as there is nothing to be vacated. These positions do not seem to be sound. At the time the execution was issued, the judgment, by its proper force, and by section 36 (*supra*), was conclusive that the plaintiff had the title to the term of one thousand years, involved in the action, and that the defendant had no title thereto. If the title of the defendant to the reversion could be sold, he had no title to the term of one thousand years. If he had actual

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possession of the land, after judgment of ejection against him, that possession was, as to the judgment, tortious, and incapable of sale under the execution upon the judgment. The right to make the motion under the statute was not an interest in the land, was not sold in fact, and was not in its nature leviable upon, as it was a right of the same kind as a chose in action. So far as the term of one thousand years, recovered by the judgment, is concerned, the sheriff's deed did not convey to the plaintiff more than he already had. The present appeal does not call for attention to the state of the reversion.

The sale under the execution, whatever its effect upon such part of the judgment as was for costs, did not satisfy or cancel such part of it as adjudged title to be in the plaintiff.

Nevertheless, while the objection noticed should not be sustained, I am of the opinion that, on the motion, it did not appear that justice would be promoted and the rights of the parties more satisfactorily ascertained and established by a new trial. In the first place, there was not in the moving papers any specification of the grounds on which the motion for a new trial was made, or any other indication to the opposing party, or to the court, of where error or injustice was to be discovered, other than a statement that the motion was made "upon the affidavit annexed, and upon all papers, pleadings and proceedings in this cause." This did not point out that reliance was placed upon defendant's counsel omitting to call attention on the former trials to defects in the steps taken towards the tax sale. The notice, in re-naming proceedings, calls attention, perhaps, to the trial as a whole, but not to any particular part of it, and certainly not to it, as evidence that an oversight had happened. The notice was vague, and its general words concealed,

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rather than disclosed, what position was taken, as ground for a new trial.

In the second place, and upon the merits, the case of *Wright v. Milbank* (9 *Bosw.* 672), states principles that must be applied here. It is not every error, even though it may be clear, that calls for a second new trial. The defendant in ejectment has received great protection before such a motion can be made. Any error upon the first two trials can be corrected upon appeal; or, after the first trial, he can have a second trial as a right, upon payment of costs. In making the motion for a new trial for the second time, the discretion of the court is addressed to a certain extent. At least, it is the duty of the court to consider the nature of the alleged mistake, and to go so far as to find that substantial justice requires a new trial, as distinguished from a declaration that a question must be answered by law, one way or the other. It must further determine to what extent, if at all, the defendant is himself responsible for the court having, on the former trial, made the mistake or omitted to consider the ground urged on the motion. If the omission of the defendants' counsel to point the court to the matter is not excused or accounted for, but may have been intentional, general principles of jurisprudence, forbid that it should be made a reason for saying that a new trial will more satisfactorily establish the rights of the parties.

The reasons urged for a new trial are certain defects, which it is argued exist in the proceedings for the tax sale and after it. The court on neither trial overlooked the important principle that the statutes must be strictly pursued, but correctly applied it, and correctly passed upon all the objections that the defendant's counsel chose to take. These statutes are numerous and intricate, and the court is only properly called on to determine such points in them as counsel

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advert to. For many years the diligence and astuteness of counsel have been given to this subject, and an omission to make particular objection, in the absence of explanation as to the cause of the omission, should be deemed a waiver of the objections for all future purposes in the litigation. Otherwise it will grow to be a habit, to reserve an objection, simply to be used for the first time on a motion for a second new trial.

Outside of the rule, that statutory directions as to the tax sale must be strictly followed, the present objections are of a formal or technical character. The rule has been implicitly followed to every extent called for by defendants' counsel. These objections are like the following: that a notice was not published in the *City Record*; that the call for unpaid taxes was published in but nine out of the eleven newspapers designated by the comptroller, or in but seven out of the ten newspapers designated under chapter 574 of the Laws of 1871; that, as stated in the supplementary brief of the learned counsel for defendants, its notice to redeem required redemption on or before the 14th, 15th, 16th, 18th, 21st, 22d and 23d days of December, 1873, instead of a day certain; and that the personal notice to the owner to redeem was given by the purchaser before he had received the comptroller's deed, and not after. Such objections are meritorious, when taken at the right time, but do not call for a second new trial.

I am of the opinion that the order below should be reversed with \$10 costs.

FREEDMAN, J., concurred.

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MARGARETTA SCHAPPERT, AS ADMINISTRATRIX,
&C., PLAINTIFF AND RESPONDENT, v. GEORGE
RINGLER, ET AL., DEFENDANTS AND APPEL-
LANTS.

NEGLIGENCE RESULTING IN DEATH.

The plaintiff is bound to show, affirmatively, that the intestate did not contribute to the result, and that the defendant's negligence was the sole cause.

In this case, before any request to charge had been made, the court said to the jury:

"If you find, *from the testimony*, that this unfortunate man contributed, in any way, by his own act, to the accident which resulted in his death, the plaintiff cannot recover. But of that you must be satisfied. You must set your hand upon something that is sworn to in evidence here." And again:

"If you put your hands upon anything, and satisfy yourselves that he has done something, by his own acts, by which he has lost his life, then the plaintiff cannot recover."

The defendants' counsel excepted to these propositions charged, and requested the court to charge, "that if the jury believe, from the evidence, that any act of Louis Schappert aided or contributed towards his injury, then the defendants are not liable. Plaintiff must prove, to the satisfaction of the jury, that Schappert was entirely free from fault."

This request was denied, and exception taken. *Held*, by the court, that these exceptions were well taken, and there should be a new trial.

Before SEDGWICK and FREEDMAN, JJ.

Decided November 8, 1879.

Appeal from judgment on verdict in favor of plaintiff.

The complaint charged that defendant's negligence

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caused the death of plaintiff's intestate, and claimed damage thereupon, to the next of kin.

The circumstances of the death were as follows: The defendants owned and did business in a brewery in which was an elevator, that was worked from the cellar floor to the highest floor. They had contracted, with one Everspacher, that he should build for them an ice-house in the brewery. The intestate was in the employment of Everspacher. In performing his contract, Everspacher directed the intestate and other laborers to remove from the cellar, dirt and rubbish there. On the day of the occurrence in question, as one of the defendants testified, Everspacher asked me "if he could have that elevator for hoisting out his dirt and stuff, when I was not using it, and I told him he could have it when I was not using it, and I would give him my engineer or foreman to run the elevator for him." On that day, the defendant "ran the elevator himself" until 12 o'clock, and afterwards the defendants' foreman ran it. In the afternoon, the deceased with other laborers shoveled upon the platform of the elevator dirt from the cellar. On a signal, defendants' foreman, who was in charge of the engine that worked the elevator, set it in motion, and the platform was raised to the street floor. There was evidence that the deceased remained on the platform while it was raised. He and the other laborers began to shovel the dirt from the platform. It took some time to remove it all. According to the testimony of the defendants' foreman, he left the engine as soon as it reached the street, and went to another part of the brewery, not returning to the engine until after the accident. There was a conflict of testimony as to whether the workmen had removed all the dirt before the platform moved again. The testimony for plaintiff was, that it had not been removed; that for defendant was that the platform was clear of dirt. The defendant, sworn,

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testified "after the dirt was removed, I heard Schapper (the intestate) hallooing to lower the elevator. I told him just wait a minute, until the engineer or foreman was coming, that I had not got time." The witness was then fifteen or twenty feet from the platform. He moved, as he swore, some distance away, and two or three minutes after, heard the elevator fall. He swore that he told Schappert to wait until the engineer or foreman came in.

The testimony tended to show that while the intestate and the others were on the platform, it was suddenly raised to the top of the elevator, and, the fastenings breaking, immediately fell to the cellar floor, thereby inflicting injuries which caused the death of intestate. No testimony whatever was given to show what caused the platform to be set in motion.

The testimony also tended strongly to show that the defendants had often forbidden the intestate to go up or down on the platform, directing him to use the stairs.

The jury found for the plaintiff.

Daily & Machin, and *Henry Daily, Jr.*, for appellants.

Ernest Hall, for respondent.

BY THE COURT.—SEDGWICK, J.—The defendants' own evidence affirmatively proved that, so far as the working of the elevator went, the defendants were to control it. They told their contractor that they would give the engineer or foreman to run the elevator. This engineer or foreman was to be, as the whole case showed, under the command or at the bidding of the defendants. There was no agreement or understanding that the contractor should see to the proper running of the machine. The fact was, that while the ele-

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vator was in use, the engine attached to it was not in charge of the engineer or foreman, or, so far as the testimony directly showed, of any person. If these things were not incontrovertibly proved by the testimony, the plaintiff was entitled to have the verdict of the jury as to their existence. If they did exist, there was a duty on the defendants to the plaintiff, to use diligence in setting the engine in work properly, and in seeing that it should not be set in motion improperly.

Coughtry v. The Globe Woolen Company, 56 N. Y. 124, is in point. Accordingly the learned court below was correct in leaving to the jury, as it did, the question of defendants' negligence.

But I think the defendants had a right to have charged, a request that their counsel made on the subject of the intestate's contributory negligence. The case did not explicitly show that the deceased was free from negligence. Without adverting to whether the evidence admitted of an inference that the intestate himself was the cause of motion being applied to the elevator, there was sufficient to call for the jury's verdict on the point, whether the plaintiff did not negligently remain on the platform after it was cleared of dirt, when ordinary prudent attention to his known duties required him to leave the platform and go to the cellar by the stairs. On the trial it was assumed that there was a question for the jury as to plaintiff's contributory negligence.

As to this, before the request referred to was made, the court had said : " If you find from the testimony that this unfortunate man contributed in any way, by his own act, to the accident which resulted in his death, the plaintiff cannot recover. But of that you must be satisfied. You must set your hand upon something that is sworn to in evidence here." And again : " If you put your hands upon anything, and satisfy yourselves that he has done something by his own acts,

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by which he has lost his life, then the plaintiff cannot recover." The defendants' counsel excepted to these propositions, and requested the court to charge that "if the jury believe from the evidence that any act of Louis Schappert aided or contributed towards his injuries, then the defendants are not liable. Plaintiff must prove to the satisfaction of the jury, that Schappert was entirely free from fault." This last sentence no doubt was to be understood as referring to any fault that contributed to the cause of the injury. The request was denied, and exception was taken. It seems to me that, inadvertently, the jury received the impression that on this point they should find for plaintiff, unless there was some proof that the intestate contributed by his own negligence to the result. But, in such cases, the plaintiff is bound to show that the intestate did not contribute to the result. In substance, he is held to show affirmatively that the defendant's negligence was the sole cause. If there were no proof of any act of contributory negligence, and yet the whole case did not show that there was no contributory negligence, the plaintiff cannot recover.

For this reason, I think there should be a new trial.

Judgment reversed, verdict set aside, and a new trial ordered, with costs of this appeal to appellant to abide event.

FREEDMAN, J., concurred.

Statement of the Case.

**MAX HARNICKELL, PLAINTIFF AND RESPONDENT,
v. WILLIAM H. BROWN, DEFENDANT AND
APPELLANT.**

PRINCIPAL AND BROKER.—EXCEPTIONS TO EVIDENCE.

In this case there was a contest over the allowance of a commission to the plaintiff on the purchase and sale of 100,000 pounds of copper, a portion of the gross amount of the sales, which portion defendant claimed was purchased by plaintiff on his own account, and for the purpose of enabling him to procure a sale for 550,000 pounds, a larger amount by 100,000 pounds than defendant had furnished the plaintiff to sell. The exceptions to the evidence in the case relate to this 100,000 pounds of copper. A letter of plaintiff had been read in evidence on the part of defendant, in which plaintiff wrote: "N. S. S. has secured for me 100 M. lbs. of Lake Ingot Copper for July and August delivery. . . . I herewith transfer above interest to you." The plaintiff's counsel asked the plaintiff, while testifying, "What did you mean, when you wrote the letter, by the words 'for me'?" This question was objected to, and objection overruled, and exception taken; and plaintiff's answer was, that he "must have meant—as I had asked Simpkins to sell this copper as a personal favor to me, he put it down in my name; or it must have been in accordance with my way of saying 'I have bought or sold' when I meant my principal." Another question in like manner allowed, was: "Did you desire, when you wrote that letter, to inform defendant of anything more than the fact that you had secured of Simpkins 100,000 pounds of copper for his account."

These exceptions were overruled, the court holding, 1st. The rule to be applied is not the one that relates to the words of a contract; the words "for me" were not a part of the contract, but were in the nature of an admission from the plaintiff, tending to show that he bought this copper on his own account, and he had a right to prove what he meant to state or show in the use of the words "for me," in the letter. 2d. Defendant had examined plaintiff on this subject, in such a way as to entitle him to the questions objected to, in explanation of the facts, and his admissions in the case.

The above questions and answers made a fuller statement or explana-

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tion in regard to the matters, part of which defendant had already obtained on the direct examination.

For the latter reason, the exceptions of defendant to the introduction, by plaintiff, of two entries in his own book of sales, cannot be sustained. The defendant had introduced the first of the entries at an earlier time in the trial.

There was a conflict, as to whether the plaintiff had agreed to act for one-half of the usual commission, and defendant had testified that plaintiff's agreement in this regard had followed his (defendant's) statement that one Houston had offered to sell this copper for half brokerage, and if plaintiff wanted to do it at that rate, he might do so. As to this, plaintiff testified that he then said, "You don't expect me to do the five hundred and fifty thousand business at one quarter per cent.?" to which defendant answered, "Certainly not; you shall have one-half per cent."

The plaintiff asked Houston, when called as a witness, if he had ever offered to sell copper for the defendant at less than usual commissions, within the year 1872, before April 1. Defendant's exception to the allowance of this question was properly overruled, for the reason that the testimony of Houston on this point would support the testimony of either the plaintiff or defendant, in regard to this contract.

Before SEDGWICK, SPEIR, and FREEDMAN, JJ.

Decided November 8, 1879.

Appeal by defendant from judgment, entered on report of referee.

Chandler & Smith and James E. Chandler, for respondent.

Erastus New, for appellant.

BY THE COURT.—SEDGWICK, J.—The action was for the value of plaintiff's services, as defendant's broker, in selling copper. It was admitted that some amount was due.

The first position that calls for attention is, that the referee erred in allowing a commission upon a quantity of one hundred thousand pounds of copper, parcel of the gross amount, because, although plaintiff

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sold that copper for defendant, and as his broker, yet, as is alleged, the evidence shows, in substance, that the defendant bought and sold the one hundred thousand pounds of copper, for the sole purpose of aiding the plaintiff in selling the rest of the copper, and altogether for plaintiff's benefit. The position cannot be sustained. The evidence allowed the referee to find, that the plaintiff's acts in respect of the parcel was for the interest of the defendant and at his request.

There were exceptions that relate to the purchase of the parcel of one hundred thousand pounds. The plaintiff had proposed to defendant to sell for him a quantity of five hundred and fifty thousand pounds of copper, for which, but not for a less amount, he was able to find a buyer. The defendant with others, at a certain time, could command only four hundred and fifty thousand pounds. For the purpose of making up the necessary quantity, the plaintiff bought the one hundred thousand pounds. On the trial the plaintiff alleged that he bought it for the defendant, and on his account, while the defendant alleged that the plaintiff bought it for himself, and transferred it to defendant for the purpose of enabling himself to earn commissions in selling the whole lot. A letter signed by the plaintiff was introduced, notifying defendant that "N. S. S. has secured for me 100. M lbs. of Lake Ingot Copper for July and August delivery . . . I herewith transfer above interest to you." The plaintiff's counsel asked plaintiff, while testifying, "What did you mean, when you wrote the letter, by the words 'for me'?" This was allowed, under exception, and the answer was that he "must have meant—as I had asked Simpkins to sell this copper as a personal favor to me, he put it down in my name; or it must have been in accordance with my way of saying 'I have bought or sold,' when I meant my principal." Another question was, "Did you desire, when you wrote that letter, to inform de-

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fendant of anything more than the fact that you had secured of Simpkins one hundred thousand for his account?" It is argued that the witness had no right to give his undisclosed intentions, or to construe the words which had a definite meaning. The rule to be applied is not the one that relates to the words of a contract, made between the parties. The words "for me" were not part of the contract. They were in the nature of an admission, from which it might be argued that the plaintiff dealt in his own behalf with Simpkins. He would therefore have a right, not only to give the facts, and to testify in substance that he meant by those words to describe that fact, or he might prove what meaning he thought at the time the words bore, or again, what his purpose at the time was; all these things were relevant to the question of what did the use of the words show, that he knew or believed.

But beyond this, I think that defendant had before examined the plaintiff on the subject, in such a way as to entitle the plaintiff to the questions objected to. When the defendant offered the letter, he put questions to the plaintiff, which drew out the following: "I had bought from Simpkins. It is is not uncommon for a broker to have copper bought by him charged in his own name: that may have been the case in the transaction mentioned in said letter, and explains the statement therein about my making the transfer; such buying or selling in one's own name is, if buyer or seller does not want to be known in the market; it is usual to say that the sale is on account of the principal and not in the broker's name when parties don't want their name to appear." I think this course of examination gave the plaintiff the right to ask the questions objected to. They made a fuller explanation, part of which the defendant had obtained. On the ground last stated, the exceptions to the introduction by plaintiff of two entries in his own book

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of sales, cannot be sustained. As to the first entry, the defendant had himself introduced it at an earlier time. The second entry was "April 1, N. S. Simpkins, W. H. Brown, 100,000 Lake, July, Aug., 33 cts." The defendant had drawn from a bookkeeper of plaintiff, that the page containing the above entries was in the witness's writing, and that on April 1 the plaintiff bought 300,000 pounds from Simpkins; and then gave in evidence, as is to be inferred from the printed case (although the words are "that he proposes to offer in evidence"), the first entry above alluded to, and the entry "April 1, N. S. Simpkins, Jr., to Mr. Hendrichs, 200,000 Lake, June, July and August," and stopped there. An argument might have been made, that there was no entry of the purchase of the one hundred thousand for the defendant. I think the plaintiff had the right to meet this by showing the entry of that purchase.

There was a conflict as to whether the plaintiff agreed to act for one-half of the usual brokerage. The defendant, in giving testimony that he did so agree, testified that his agreement followed a statement by the defendant that another broker named Houston wanted to sell the copper for half brokerage, and if plaintiff wanted to do it for half brokerage, he could do so. The plaintiff had testified that the defendant had said to him jokingly, "This other broker, Mr. Houston, has offered to do this business of one hundred thousand at one quarter per cent.;" that witness then said, "You don't expect me to do the five hundred and fifty thousand business for one quarter per cent.?" and the defendant said, "Certainly not, you shall have one-half per cent." The plaintiff, after defendant's testimony, asked of Houston, the other broker, when called as a witness, if he ever offered to the defendant to sell copper at less than the usual commission within the year 1872, before April 1.

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The defendant's exception to the allowance of this question is not sound. For if, on the one hand, he really had Houston to fall back on, he would have a motive to insist on plaintiff's lessening the commissions; on the other hand, if Houston had not made the offer, he would be more likely to accede to plaintiff's terms, according to plaintiff's version.

The other exceptions have been examined, but are not tenable.

Judgment affirmed, with costs.

SPEIR and FREEDMAN, JJ., concurred.

**RUTH A. GANE, PLAINTIFF AND RESPONDENT, v.
GEORGE A. GANE, DEFENDANT AND APPELLANT.**

DIVORCE, JUDGMENT OF.—ALIMONY INCLUDED THEREIN.

Enforcement of the same by proceedings to punish defendant for contempt of court, in the disobedience of the judgment.

The order appealed from directed, in substance, that the defendant pay to plaintiff the alimony due to her under the judgment of divorce, to the date of the order, to wit: the sum of \$775; and also that he pay, after the date of the order, \$600 annually, in weekly payments, and that he give security for the future payment of the \$600, and in default thereof, that an attachment issue, punishing said defendant for a contempt of the court.

The original judgment might have been enforced by execution, and for that reason the court had no power to enforce it, in case of disobedience, by commitment for contempt (*Code Civ. Pro.* §§ 14, 1241).

The statute, in permitting the requirement of reasonable security as a means of enforcing the order or judgment, does not permit a commitment for contempt; and in case of disobedience, the only relief is the application, through sequestration, of the defendant's property to the payment of the allowance (*Lansing v. Lansing*, 4 *Lans.* 37; and see statutes cited in the opinion of the court).

Respondent's Points.

Before SEDGWICK and FREEDMAN, JJ.

Decided November 8, 1879.

Appeal from order, directing that defendant pay a certain amount as alimony, directed to be paid by final judgment; and that he give security for the future payment of said alimony; and in default thereof, that an attachment issue, punishing him as for a contempt of court.

Thomas J. McKee, attorney, and of counsel, for appellant, urged:—I. Proceedings for a contempt of court, having in view the commitment of the defendant to close custody, cannot be had for disobedience of a final judgment, where, by law, an execution can be awarded for the collection of a sum of money, directed and ordered to be paid by such final judgment (*Code Civ. Pro.* § 14, subd. 3; *Lansing v. Lansing*, 4 *Lans.* 371; 2 *R. S. Edm. ed. c. 8*, tit. 13).

II. Under a judgment and decree in a divorce suit, *a vinculo matrimonii*, ordering and directing the payment of alimony, judgment may be entered from time to time for the alimony accruing under such final judgment, and an execution issued thereon for the collection of the same (*Miller v. Miller*, 7 *Hun*, 208; *Marsh v. Marsh*, *Daily Reg.* January 16, 1879).

III. The order appealed from, ordering and directing the defendant to give security for the future payment of said \$600, alimony, is erroneous, and utterly void. The jurisdiction of the court over the parties to this suit terminated with the entry of final judgment, except to enforce the judgment as rendered. The relation of husband and wife, is terminated by the decree (*Kamp v. Kamp*, 59 *N. Y.* 212; *Leitch v. Cumpston*, 4 *Paige Ch.* 476).

Robert W. Todd, attorney, and of counsel, for re-

Respondent's Points.

spondent, urged:—I. (a) The defendant, by committing adultery, subjected himself and his property to the jurisdiction of the court, so far as to enable the court to order his property to be applied to the support of his family, both during the litigation and afterwards. And the power of the court extends to compelling the defendant to apply a portion of his daily earnings to the same object (*Kirby v. Kirby*, 1 *Paige*, 261; *Lawrence v. Lawrence*, 3 *Id.* 267; *Bishop on Marr. & Div.* 5 ed. §§ 446, 447, 481; *Ford v. Ford*, 41 *How. Pr.* 169; *Cary v. Cary*, 2 *Daly*, 425). (b) The court, in granting a decree of divorce, at the suit of the wife, is authorized to make a decree, or order, compelling the defendant to provide such suitable allowance to her, for her support, as the court may deem just, having regard to the circumstances of the parties respectively (3 *R. S.* 6 ed. p. 156, § 58). This order, or decree, the court may enforce by sequestration (*Id.* p. 159, § 74). Sequestration, in the court of chancery, was not in the nature of an execution against property. It was a process which issued where a party was in contempt; its object was to compel obedience to the orders of the court, and it issued, sometimes, when the party was in custody for contempt, and persisted in his contempt. It did not require the collection of any definite amount, but commanded the sequestration to take all the personal property, and all the rents and profits of the real estate (1 *Barb. Ch. Pr.* 67; 2 *Id.* 382; *Bouv. Law Dic.* "Definition"). (c) The counsel for the appellant may claim that this case comes under subdivision 3 of section 14 of the Code of Civil Procedure, being for the non-payment of a sum of money, and that an attachment cannot issue, because an execution can be awarded. But it has already been shown that sequestration is not an execution for the collection of a sum of money, but is a process of punishment for contempt; so that it is not apparent, from the provisions re-

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lative to divorce, that an execution for alimony can be awarded ; and, again, subdivision 8 of section 14 of the Code of Civil Procedure retains attachments and proceedings for contempt as they have been usually adopted and practiced.

When, in a decree for a divorce, the court awards alimony, the court decides that in the circumstances of the parties, respectively, it is the duty and in the power of the defendant to pay to the plaintiff the amount allowed for her support ; as it was his duty to support her while she remained his undivorced wife, so it continues to be his duty now that, for his fault, she has been relieved from her marriage duties. His failure to do this is a violation of duty, and a contempt of court, unless excused by inability ; this is not the case of a debt which a defendant owes, whether or not he has the means of paying ; but on the basis, partly of the defendant's property, and partly of his ability to earn money, the court decides that he can pay, and ought to pay, so much towards the support of the woman whom he has wronged.

II. The defendant should be compelled to give security for the payment of the alimony awarded to the plaintiff herein.

This is expressly provided for by statute, as follows :

"Whenever the court shall make an order or a decree, requiring a husband to provide for the maintenance of his children, or for an allowance to his wife, the court may require such husband to give reasonable security for such maintenance and allowance" (3 R. S. 6 ed. p. 159, § 74 ; *Forrest v. Forrest*, 3 Abb. Pr. 144 ; *Davis v. Davis*, 1 Hun, 444).

BY THE COURT.—SEDGWICK, J.—This was an action for divorce *a vinculo*. In 1871 the plaintiff had judgment in her favor, among other things, ordering and adjudging that the defendant pay to the plaintiff, there-

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after, \$25 each week for her support. This was paid until 1878, when there were arrears. On August 21, 1878, the plaintiff entered a judgment against defendant, in the sum of \$576, as the arrears of the alimony. No question is made, on this appeal, of the regularity of either judgment. An execution against the property of the defendant was returned unsatisfied, and he was examined in proceedings supplementary to the execution. His examination did not show that he had money or property, which the court could order him to apply to the judgment.

On all the proceedings, and a demand and refusal to pay, the defendant was ordered to show cause "why he should not be punished for his misconduct in disobeying" the order "and judgment of this court by not paying the alimony, by said order and judgment directed to be paid to plaintiff, and why he should not give security for the future payment of said alimony."

The order made thereupon was, that the defendant pay to the plaintiff, "within ten days after the service of a certified copy of this order upon him, the alimony due and owing under the judgment of July 28, 1871, from August 13, 1878, to the date of this order, to wit, the sum of \$775. That from and after the date of this order and until the further order of this court, he pay to the plaintiff or her attorney, for and on account of the alimony directed to be paid by the judgment of July 28, 1871, the sum of \$600 annually, in weekly payments, said payments to be on the Tuesday of each week; and that he give security for the future payment of said \$600; and in default thereof, that an attachment issue, punishing said defendant as for a contempt of court."

The final judgment was for the payment of money, by the defendant to the plaintiff. The money to be paid was not a specific fund. It was not to be paid to the court or to an officer of the court. If the court had

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exercised, at the time of final judgment, the power it possessed, of requiring the defendant to give reasonable security (3 *R. S.* 6 ed. 159; 2 *R. S.* 148, § 60), the provision in that respect would not have been a part of the judgment in the true sense, but only a means of enforcing the judgment.

The judgment might have been enforced by execution, and for that reason the court had no power to enforce it, in case of disobedience in not giving the security or in not paying the money, by commitment for contempt (*Code Civ. Pro.* §§ 14, 1241). Evidently the court could not order the giving security only for the purpose of permitting the plaintiff to say that the disobedience was to an order that required security to be given, and was, therefore, for the doing of something else than the payment of money. The only ground for a judicial direction is, either that such is the right or such the legal means of enforcing the right. Now, the statute, in permitting the court to require reasonable security, as a means of enforcing the order or judgment, does not permit a commitment for contempt; and the only result, in case of disobedience, is the application, through sequestration, of defendant's property to the payment of the allowance (see *R. S.*, cited above). *Lansing v. Lansing* (4 *Lans.* 377) suggests all that has been said.

Moreover, if the consequence of disobedience is to be imprisonment, it is of the very first importance that the mandate be clear and definite. The order should specify the kind and quantity of the security ordered.

Order reversed, with \$10 costs, and disbursements to be taxed.

FREEDMAN, J., concurred.

Statement of the Case.

JOSEPH TATNALL LEA, PLAINTIFF, v. ERNESTO
G. FABBRI, DEFENDANT.

I. VENDOR'S LIEN.

When does not exist. Where premises are conveyed, "subject to a certain mortgage on the southerly portion of the same," made by the vendor, which mortgage the vendee assumes and agrees to pay, by a clause in the conveyance, which states that the amount of the debt has "been deducted from the consideration herein-before expressed," there is no equitable lien upon the mortgaged premises in favor of the vendor; this, though the vendee, after paying interest for a certain time, make default, and allow the mortgage to be foreclosed, and the vendor to be thereby charged with a judgment for deficiency. The *assumption of the mortgage is, pro tanto*, the consideration.

A fortiori, there is no equitable lien upon that portion of the premises not covered by the mortgage.

II. DECLARATION OF TRUST—CONSTRUCTION OF.

The declaration in question herein was substantially that the premises conveyed to the grantee were held by him, in trust, to sell for the benefit of the grantor's creditors, and out of the proceeds, First, to pay to the grantor's wife certain sums in lieu of dower. "*Second, to pay such liens and incumbrances upon the premises sold as are not assumed by the buyers thereof.*" Third, to pay, &c., grantor's creditors generally, &c.

Upon consideration of the scope and intent of the above declaration, it was

HELD,

1. That the second subdivision thereof is to be construed as meaning that the liens must be paid out of the net proceeds of the lands upon which they exist, and not out of the net proceeds of other lands sold under the trust.
2. That the subdivision must mean a payment of liens out of proceeds of a sale made *by the trustee under the trust.*
 - (a) *Sale under mortgage foreclosure is not such a sale.*
3. That such a sale was referred to as would permit an assumption of the incumbrance, rather than one made by virtue of the incumbrance, and which merged or canceled it, so far as the buyer was concerned.
 - (a) *Sale under mortgage foreclosure is not such a sale.*

Statement of the Case.

Before SEDGWICK, SPEIR, and FREEDMAN, JJ.

Decided November 3, 1879.

Case agreed upon in a controversy submitted without action, under section 1279 of the Code of Civil Procedure.

The facts are as follows: The plaintiff conveyed to Sergeant, in consideration of \$35,000, a piece of land containing four acres, "subject to a certain mortgage, on the *southerly portion* of said premises," made by the plaintiff to one Gilson for \$10,000, which amount Sergeant assumed, and agreed to pay, "the same having been deducted from the consideration hereinbefore expressed." Sergeant went into possession, and afterwards, by deed, conveyed the premises with others, in fee, to the defendant. Simultaneously the defendant executed and delivered to Sergeant a declaration of trust. This declaration recited the conveyance above mentioned of Sergeant to the defendant, and stated that the premises were held by the defendant, in trust "to sell the same for the benefit of the creditors of said William Sergeant, and out of the net proceeds of said sales, and of rents and other profits and receipts from the premises, after deducting payments for interest, taxes, insurance, and repairs—First. If the wife of the said William Sergeant shall join in the conveyance of the land so sold, but not otherwise, to pay her such sums as shall be agreed on between her and the said Ernesto G. Fabbri, as compensation for her right of dower. Second. To pay such liens and incumbrances upon the premises as are not assumed by the buyers thereof. Third. To pay, compromise or settle all the just individual debts of William Sergeant" and for other purposes not material to the controversy. At this time the mortgage was due. Thereupon the defendant entered into possession of the premises, paid interest

Statement of the Case.

upon the mortgage to Gilson until a certain time, when he made default in its payment. Upon this default, Gilson began an action for the foreclosure of the mortgage, making the plaintiff a party, and obtained judgment of foreclosure and sale, and that the plaintiff pay any deficiency. There was a deficiency reported, and the report being confirmed, the plaintiff here paid the same in the amount of \$2,022.53. Simultaneously with the payment, Gilson assigned to the plaintiff all rights she had, under the bond and mortgage, the judgment, and the declaration in trust.

The case submits to the court these facts, for its judgment as to the rights of the plaintiff.

The questions submitted to the court are as follows :

Is the plaintiff entitled to the payment of the \$2,022.53, with interest from November 30, 1878, in full, out of the moneys realized by said Fabbri out of the trust property generally, the amount of such moneys, after provision for the dower of Mrs. Sergeant, under the first clause of the declaration of trust, being ample to pay the same in full ; or is he entitled to the payment thereof out of the proceeds of the Ewen purchase (being that portion of the premises conveyed by plaintiff to Sergeant, *not covered by the mortgage* assumed by the latter), so far as such proceeds will pay the same ; or is he only entitled to share *pro rata* with other creditors of William Sergeant, under the third clause ?

If the first question is answered in the affirmative, then judgment is to be rendered in favor of the plaintiff for the payment, by the defendant, out of the trust fund, of the sum of \$2,022.53, with interest from November 30, 1878, with costs to the plaintiff.

If the first question is answered in the negative, and the second in the affirmative, then judgment is to be rendered in favor of the plaintiff for the payment of the amount of said judgment for deficiency, with inter-

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est and costs, out of the proceeds of the Ewen purchase, so far as such proceeds will pay the same ; and that as to the amount remaining unpaid after the application of the proceeds of the Ewen purchase, the plaintiff is entitled to share *pro rata* with the other creditors.

If the first and second questions are both answered in the negative, then judgment is to be rendered in favor of the defendant, that the plaintiff is only entitled to share *pro rata* with the other creditors of William Sergeant, under the third clause of the declaration of trust, with costs to the defendant.

George H. Forster, of counsel, for plaintiff, urged :—

I. The second clause of the declaration of trust expressly covers this \$10,000 mortgage. It was, at that time, a lien and incumbrance upon the premises. The defendant admitted this by his acts in construction of the trust. He paid the interest on this mortgage for eighteen months. The \$2,022.53 was not paid by the buyer at the foreclosure sale ; the plaintiff was compelled to pay it. This trust was one for his benefit, and he is entitled to enforce it either as a party for whose benefit it was originally made, or as assignee of Mrs. Gilson, under the assignment set forth in the case. The principles established in *Lawrence v. Fox* (20 *N. Y.* 268), and in the cases following that, establish the plaintiff's right, aside from such assignment (*Durand v. Curtis*, 57 *N. Y.* 14 ; *Barlow v. Myers*, 64 *Id.* 43 ; *Arnold v. Nichols*, 64 *Id.* 119 ; *Simson v. Brown*, 68 *Id.* 358 ; *Campbell v. Smith*, 71 *Id.* 28 ; *Johnson v. Morgan*, 68 *Id.* 496 ; *Vrooman v. Turner*, 69 *Id.* 282 ; *Goldenburg v. Hoffman*, 69 *Id.* 326 ; *Miller v. Winchell*, 70 *Id.* 439).

II. The right of Mrs. Gilson was express under the declaration of trust ; the second clause was intended to provide for such incumbrances as this. If there be any doubt as to the construction, it should be strictly

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against defendant (*Ripley v. Larmouth*, 56 *Barb.* 21 ; *Marvin v. Stone*, 2 *Cow.* 781 ; *Griffin v. First Presbyterian Church*, 56 *Barb.* 114).

III. As between the parties to the deed of November, 1873, Lea and Sergeant, the land is the primary fund for the payment of the mortgage, and the grantor, Lea, is entitled to have it so applied as to protect him from the deficiency he paid. Fabbri here stands in no better position as to Lea than Sergeant stood, and as between Lea and Fabbri, the plaintiff is entitled to have the \$2,500, realized by Fabbri from the Ewen purchase, applied to relieve Lea from the deficiency which he has been compelled to pay on the mortgage, which was assumed by Sergeant as part of the consideration of the conveyance of such Ewen property, the same having been deducted from the consideration (*Comstock v. Drohan*, 71 *N. Y.* 13, and 15 *Supreme Court* [8 *Hun*] 373.) There was a lien on such Ewen purchase, for such unpaid purchase-money. The court of Appeals, in *Comstock v. Drohan*, says: "The land was the primary fund for the payment of the mortgage, and as against the defendant, the plaintiff was entitled to have it so applied before being called upon to respond to his liability as her surety, so that he might not be compelled to advance more than the deficiency which should arise on a sale of the mortgaged premises. For this deficiency, paid by him, the defendant was clearly liable to him." A grantee is bound to fulfill covenants on his part, in a deed executed by the grantor only, and acceptance of the deed and property binds him to pay a mortgage he has assumed therein, and he is liable to the grantor for the deficiency found due on a foreclosure thereof (*Spaulding v. Hallenbeck*, 35 *N. Y.* 204 ; *At. Dock Co. v. Leavitt*, 54 *Id.* 35 ; *Trotter v. Hughes*, 12 *Id.* 74 ; *Burr v. Beers*, 24 *Id.* 179 ; *Binsse v. Paige*, 1 *Abb. Ct. App. Dec.* 138, note ; *Marsh v. Pike*, 10 *Paige*, 595 ; *Halsey v. Reed*, 9 *Id.* 446 ; *Ru-*

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bens v. Prindle, 44 *Barb.* 336 ; Johnson v. Zink, 52 *Id.* 396 ; Mills v. Watson, 1 *Sweeney*, 374 ; Tillotson v. Boyd, 4 *Sandf.* 516 ; Ranson v. Copeland, 2 *Sandf. Ch.* 251 ; Thorp v. Keokuk Coal Co., 48 *N. Y.* 253, 257 ; Rector v. Higgins, 48 *Id.* 532 ; Mauri v. Hefferman, 13 *Johns.* 58 ; Ely v. McNight, 30 *How.* 97 ; Norman v. Welles, 17 *Wend.* 136 ; Hunt v. Amidown, 4 *Hill*, 345 ; Ferris v. Crawford, 2 *Denio*, 595 ; Jumel v. Jumel, 7 *Paige*, 591 ; Barker v. Bucklin, 2 *Denio*, 45 ; Trip v. Vincent, 3 *Barb. Ch.* 613 ; Garnsey v. Rogers, 47 *N. Y.* 233 ; Miller v. Watson, 5 *Cow.* 195 ; Baxter v. Ryers, 13 *Barb.* 267 ; Machaiwe Bank v. Culver, 30 *N. Y.* 313 ; Schweriger v. Hickok, 53 *Id.* 280 ; Bartlett v. McNiell, 60 *Id.* 53).

Porter, Lowrey, Soren & Stone, attorneys, and *George S. Hamlin*, of counsel, for defendant, urged :—I. The statements in regard to the Ewen purchase are immaterial. The deed from Lea to Sergeant did not, by including the Ewen purchase, render it subject to a mortgage upon other premises conveyed by the same deed. But if the premises were not subject to the lien of the mortgage, neither were the proceeds ; and if not subject to the lien of the mortgage then neither under the mortgage, nor the declaration of trust, were the proceeds applicable to the payment of this deficiency in preference to any other debt.

II. The only question presented in this case, therefore, depends upon the construction of the second provision of the declaration of trust, viz. : "To pay such liens and incumbrances upon the premises as are not assumed by the buyers thereof." The argument of the plaintiff, of course, is : The mortgage in question was an incumbrance upon the premises. It was not assumed by the buyer thereof. It is, therefore, within this provision, and there is an express trust to pay this, in preference to general debts referred

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to in the third provision of the declaration. But this reasoning disregards very elementary principles in the construction of written instruments. 1. This provision must be construed in connection with the other portions of the instrument. The construction contended for by the plaintiff can be sustained only by taking the provision in its most literal signification and entirely dis severed from its proper connections. "It is a true rule of construction that the sense and meaning of the parties, in any particular part of an instrument, may be collected, *ex antecedentibus et consequentibus*. Every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done" (Per Lord ELLENBOROUGH, in *Barton v. Fitzgerald*, 15 *East*, 541). 2. The general words of this provision must be limited and controlled by the scheme and purpose of the whole instrument. The provision is for the payment of "such liens and incumbrances as are not assumed by the buyers." But the buyers here referred to are not all buyers, but buyers upon a sale such as is provided for in the declaration of trust; that is, a sale by the trustee for the benefit of creditors. There is no mention or intimation of any other kind of sale, and this provision can properly extend only to incumbrances not assumed by the buyers on such a sale. "The matter in hand is always presumed to be in the mind and thoughts of the speaker, though his words seem to admit a larger sense, and therefore the generality of the words used shall be restrained by the particular occasion" (*Powell on Cont.* 389; *Van Hagen v. Van Rensselaer*, 18 *Johns.* 423). "All words, whether they be in deeds or statutes or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person" (*Bacon's Law Maxims*, *Reg.* 10. See also, *Decker v. Furness*, 14 *N. Y.* 615). "Where a release acknowledged the receipt of \$1, in full of a certain judgment,

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(describing it), and also in full of all debts, demands, judgments, executions, and accounts whatsoever, held, that it was restrained by the particular words, to the judgment only ; and did not operate upon a mortgage between the parties" (*Jackson v. Stackhouse*, 1 *Cow.* 122 ; See also *McIntyre v. Williamson*, 1 *Ed. Chan.* 34 ; *Browning v. Wright*, 2 *B. & P.* 13).

III. The declaration of trust did not contemplate nor provide for, and has no application to, a case like the present. 1. The declaration of trust provided for the payment only of incumbrances upon the premises not assumed by the buyers thereof. It therefore presupposed a sale as a condition of such payment, and a sale upon which the assumption of the incumbrance by the buyer was possible. But here there was no opportunity for the buyer to assume the incumbrance. The sale was of necessity, by virtue of, and not subject to, the incumbrance. Its assumption by the buyer was impossible. 2. The declaration contemplated a sale by the trustee, and by him only. This was the essence of the trust, that the trustee should "sell the same for the benefit of the creditors of William Sergeant." No other sale is mentioned or referred to in the declaration. Any other sale was outside and independent of the trust, and created a case not contemplated or provided for by it. The incumbrancer had his election. He might allow the trustee to execute the trust and sell the property, whenever he could sell for the benefit of the creditors. He then became entitled to the benefit of the second provision of the declaration, that is, either to the assumption of the incumbrance by the buyer, or its payment by the trustee. He might, on the other hand, for his own individual benefit, enforce his lien and sell the property under it ; but in so doing he withdrew the premises from the control of the trustee, and rendered the operation of this clause of the trust impossible (See *Hoffman v. Aetna Ins. Co.*, 32 *N. Y.* 412).

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IV. A sale by the trustee for the benefit of creditors was a condition precedent to the operation of the first and second provisions of the trust. It is so expressed in the first provision. The payments are to be made to Mrs. Sergeant, if she shall join in the conveyance of the lands "so sold," that is, sold by the trustee, "but not otherwise." Can there be any question that the application of the phrase "so sold" is continued, and that when it says: "To pay such liens and incumbrances upon the premises as are or are not assumed by the buyers," it means upon the premises so sold?

V. The payments under the first and second provisions of the declaration were not of the essence of the trust, but were subsidiary to its proper administration, and the accomplishment of its main purpose. The trust was, in substance, to sell the premises "for the benefit of the creditors of William Sergeant," that is, the creditors generally; and then, as indicated by the third provision, "to pay, compromise or settle all the just individual debts of William Sergeant," not all, after the payment of those previously provided for. This embraced the entire general purpose of the trust. The previous payments were subsidiary and contingent upon their becoming necessary to the advantageous disposition of the property, and conveying a perfect title. This was obviously true in regard to payments to Mrs. Sergeant, for they were to be made only in case the amounts were agreed upon between her and the trustee, and she joined in the conveyance of the lands "so sold." And so of the payment of liens and incumbrances. If, upon a sale for the benefit of creditors, the buyer was unwilling to assume an incumbrance, and insisted upon a clear title, then, as in the case of the dower right, the trustee was authorized to pay it, in order to facilitate such a sale, and carry out the general purpose of the trust.

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VI. The construction contended for by the plaintiff is inconsistent with any presumable intent of the parties. 1. The result of this construction is to add to the security of the existing lien or incumbrance the further security of a preference, under the declaration of trust. The payment of the secured creditors, it is obvious, may, and in fact will, exhaust the entire fund, leaving nothing whatever for the unsecured creditors. There is nothing in the circumstances or in the instrument itself to explain so unusual a provision. There is no conceivable motive for such a gratuity to the incumbrancer. It is clear that, if understood in this way by the unsecured creditors, they would never have acquiesced in it, if they had the power to defeat it. And at that time they had such power. 2. Such a preference was forbidden by the bankruptcy act, which was in force at the time of the execution of the conveyance and declaration of trust. But the court will not adopt a construction which renders an instrument unlawful or invalid, when its language admits of an interpretation entirely consistent with its legality and validity. "If the language of a deed or will is susceptible of two constructions, and by adopting one of them it would be unlawful, while if the other were followed it would be valid, the latter interpretation should be given, *ut res magis valeat quam pereat*" (Post v. Hover, 33 N. Y. 601; Townsend v. Stearns, 32 Id. 214; Benedict v. Huntington, Id. 219).

VII. It is not enough to entitle the plaintiff to payment in full, even upon his own construction of the trust, for him to show that the moneys realized are ample, after provision for the dower of Mrs. Sergeant, to pay his claim in full. There were other liens and incumbrances, and it was incumbent upon him to show either that they were assumed by the buyers, or, if not, that the moneys realized were sufficient to pay those incumbrances in full, as well as his own.

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BY THE COURT. —SEDGWICK, J.—The plaintiff, upon his conveyance to Sergeant, had only such rights as arose from Sergeant's promise to pay the mortgage, with the rights of a surety, that enabled him to require that the mortgaged property should be first applied to the payment of the mortgage debt. The clause by which Sergeant assumed the payment of the mortgage, stated that the amount of the debt had been deducted from the consideration money. It is manifest that there remained no equitable lien for this part of the consideration, either upon the premises conveyed or even upon the part of them mortgaged; for such a lien, if it could have otherwise existed, could not remain, upon its appearing that the assumption of the mortgage was to be the part consideration, in lieu of money. The rights of the plaintiff did not affect Sergeant's power of disposition of the whole of the equity of redemption of the mortgaged part, and the fee of the other part. Sergeant had no obligation, excepting his agreement to pay the mortgage.

The only additional right claimed by the plaintiff is such as arises from the provision in the declaration of trust made by the defendant, upon the conveyance by Sergeant of certain property, including the particular premises—that the property is held in trust "to sell the same for the benefit of the creditors, and out of the net proceeds of said sales and rents, and of other profits and receipts from the said premises, after deducting payments for interest, taxes, insurance and repairs: First, if the wife of the said William Sergeant shall join the conveyance of the lands so sold, but not otherwise, to pay her such sums as shall be agreed upon between her and the said Ernesto G. Fabbri, as compensation for her right of dower. Second, to pay such liens and incumbrances upon the premises as are not assumed by the buyers thereof," &c., &c.

The plaintiff argues that the land in question has

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been sold in the foreclosure of the mortgage, and the buyer has not assumed the payment of the mortgage, therefore, his case is described by the second subdivision, and the trustee must pay it. It seems that this subdivision must mean, that the payment of the liens must be out of the net proceeds of the land on which the liens were, and not out of the net proceeds of other lands sold. The trustee has not sold the lands upon which the plaintiff had the lien. He has not, nor has he had net proceeds upon a sale made by him, as provided for by the declaration.

Again, the subdivision must mean a payment of liens out of proceeds of a sale made by the trustee under the trust, when it would be a possible thing for a buyer to assume an incumbrance. The argument implies that the clause was to be operative only after some sale of the particular land had taken place, otherwise, the obligation of the trustee were to pay, as soon after the making of the declaration as there were net proceeds of the sales of any lands, whether the mortgaged lands were or were not sold. I think it is evident that a sale was referred to, in which an assumption might be agreed for, rather than one made in a proceeding which merged or canceled the mortgage so far as the buyer was concerned. To make the agreement, without dispute, explicit on this point would not call for the supplying of words, that are now understood, to any greater extent than is usual in the ordinary methods of conveying ideas. Very few sentences, made according to usage, do not refer to words understood, and there is no obscurity or vagueness, if the custom in that regard is observed. If a particular thing is once mentioned, succeeding statements, which in their nature may be applied to those particular things, are, by the known customs of speech, considered as meant to be applied to them. The two are

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meant to be in the mind at one time, and to be thought of together.

The trust is to make sales of the premises, and out of the net proceeds of those sales to pay the liens on the premises sold, if the liens are not assumed by the buyers, at such sales. There is no trust to pay any lien, if the land on which the lien is, is not sold by the trustee.

I am of opinion, that the judgment should be for the defendant, and that the plaintiff is only entitled to share *pro rata* with the other creditors of William Sergeant, under the third clause of the declaration of trust, with costs to the defendant.

SPEIR and FREEDMAN, JJ., concurred.

THOMAS A. DAVIES, PLAINTIFF AND APPELLANT,
v. THE MAYOR, ALDERMEN AND COMMON-
ALTY OF THE CITY OF NEW YORK, DE-
FENDANTS AND RESPONDENTS.

LANDLORD AND TENANT.—MUNICIPAL CORPORATIONS, WHEN CHARGE-
ABLE WITH RENT OF PREMISES.

The liability of a tenant holding over his term for a specified rent, under the Revised Statutes, is based upon the fact that the tenant took possession originally under a lease legally made.

The resolution of the board of supervisors is not sufficient to authorize a lease to be made to the mayor, aldermen, and commonalty of the city of New York. This can only be done by a resolution of its legislative body, namely, the common council (*People v. Stout*, 23 *Barb.* 338; *Baker v. Mayor*, 9 *Abb. Pr.* 82); and for a period not exceeding five years (*Charter*, § 18).

The board of supervisors cannot legislate in behalf of the city. Persons dealing with the agents of a municipal corporation must learn the nature and extent of such agents' authority (*Hodges v. Buffalo*, 2 *Denio*, 110).

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The recorder has no authority, by his own independent action, to impose any liability upon the city (Supervisors of Richmond County v. Ellis, 59 N. Y. 620), and his act, in continuing in possession of the premises beyond the time for which rent was paid, was unauthorized, and no claim against the county or city of New York can be predicated thereon.

Before SEDGWICK and SPEIR, JJ.

Decided November 3, 1879.

Appeal from order directing verdict for the defendant, exceptions to be heard in the first instance, at general term.

The facts in the case appear in the opinion of the court.

Edmund Coffin, Jr., attorney, and of counsel, for plaintiff, urged:—I. If an original lease was legally made in 1872, by which the corporation, now known as the mayor, aldermen, &c., was made liable for rent for the plaintiff's premises, the liability continued under the Revised Statutes relative to tenants holding over (*Witt v. Mayor, &c.*, 5 *Robt.* 248; 6 *Id.* 441; *Schuyler v. Smith*, 51 *N. Y.* 309; *Marquart v. La Farge*, 5 *Duer*, 559; *Taggart v. Roosevelt*, 8 *How. Pr.* 141.) If the original letting was by parol, the obligation for rent while holding over continued in same manner, and the allegation of a lease in writing is an immaterial variance (*Thomas v. Nelson*, 69 *N. Y.* 118; *Dorr v. Barney*, 12 *Hun*, 259.) If the obligation to pay rent was originally duly contracted by written lease or by parol letting on behalf of the board of supervisors, the obligation was continued to the "mayor, aldermen and commonalty," and they are properly sued for this holding over since 1874 (*Laws* 1874, p. 360, c. 304; *Schenck v. Mayor, &c.*, 67 *N. Y.* 44.)

II. The recorder is, and was in 1872, an officer both of

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the city corporation and of the county corporation, and either of these municipalities could legally and properly, in that year, have made a lease for his chambers for official business. The office of recorder is recognized in every charter this city has ever had, from the Dongan charter, section 6, to that of 1870, section 116. By chapter 488 of the *Laws of* 1847, in section 4, it was provided that the salary of the recorder should be "fixed" by the "board of supervisors of the city and county." In the Code of 1848, section 9, his court is not recognized. In that of 1849, section 9, subdivision 14, seems to embrace it; and section 28 seems to throw upon the supervisors the duty and obligation of providing his necessary rooms for transaction of court business; but many duties of the recorder, requiring chamber work, outside of a court, as such, remained. By *Laws of* 1852, p. 409, c. 275, it is provided that "the board of supervisors of the city of New York" may increase his salary, and by *Laws of* 1855, c. 575, the same provision is re-enacted, using the same expression as to the board being that of the city and not of the county. In none of this legislation does there appear to be any express enactment as to the source of payment of this salary. In 1869 the supervisors made the salary of the recorder equal to that of a justice of this court. Their action was approved by the legislature, as follows (1 *Laws* 1872, p. 908): "§ 2. The resolution of the board of supervisors of the county of New York, adopted December 27, 1869, and approved by the mayor on December 28, 1869, respecting the salary of the recorder and city judge, by the terms of which it was made equal to that of the judges of the superior and common pleas courts of the city and county of New York, is hereby legalized. . . ."

"§ 3. No other compensation shall be allowed to the recorder or city judge for holding any other court, or in dispossession or other judicial proceedings appertain;

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ing to their office, but this shall not prevent the board of supervisors from providing chambers for such judges. . . . " Immediately after the passage of this act of 1872, the supervisors passed their resolution, and the recorder entered into the occupation of the plaintiff's premises, and continued to use them for his official chamber business, until after May 1, 1877. We have then, in this case, an officer required by law to perform duties under the city charter, which implies that the city provide a place for him to perform the duties in, and naturally makes the expense a city charge. This is the precise doctrine laid down in *Witt v. Mayor*, by this court, where the rooms were hired for the use of the street commissioner, who was an officer of the city. We have, in addition, an express provision of the legislature, authorizing the providing of chambers for the recorder, leaving the designation of those rooms to the provision of the supervisors, but not specifying directly that the board of supervisors must hire the same, nor in any way making the cost of these chambers a county charge. The plaintiff claims that the original rent of these premises was a city charge, authorized by law to be contracted by resolution of the board of supervisors.

III. The recorder entered into and used these premises under a valid contract, which bound either the city corporation or the county corporation to pay rent. Whichever was the contracting party, the defendant, since 1874, is estopped from denying the obligation, and is the proper party defendant under the chapter 304 of that year. The resolution of the board of supervisors, in 1872, authorized the entry and occupation by the recorder at the municipal expense. The evidence is clear that the auditor had before him, in 1876, a lease duly executed by somebody. This lease so referred to by the auditor in 1876, the city does not produce on demand. They are therefore estopped to

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deny its due execution. All this vexatious distinction between the dual governments is done away with by the act of 1874. There can be no question but that it is the mayor, aldermen and commonalty who were holding over, and liable to pay on that account, whether they held over under a lease made in the name of the city corporation or of the county corporation, or on a lease made by *parol* in the name of neither. The fact, that the complaint alleges a written lease in the name of the defendant in 1872, is an immaterial variance from any one of the three hypotheses (Thomas v. Nelson, 69 N. Y. 118). The corporation relies upon the decision of this court in Farmers' Loan and Trust Co. v. Mayor (4 Bosw. 80). In that case the mayor and the comptroller, without any ordinance of the common council or of the board of supervisors, or any legislative enactment, had undertaken to bind the city corporation by a lease of a pier for three years for the purpose of removing offal. After the use of the pier had continued for nearly two years, the common council, by due ordinance, directed that a public pier be set apart for the purpose. The plaintiff was paid the rent up to May 1 after the passage of this ordinance, and the action was to recover the rent under the contract of lease for the remaining year of the term. This court held that the city could not be made liable on an executory contract of lease for that purpose made by any other authority than an ordinance of the common council. The case is clearly distinguishable from the present one. This original hiring was made by due authority of the board, authorized by act of legislature. The entry and occupation of the recorder was by right, and legal. The claim is for holding over, which is a *quasi* trespass (Schuyler v. Smith, 51 N. Y. 309).

IV. The ordinance passed in 1876 does not amount to any defense. In the first place, the ordinance was

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conditional to a certain extent upon the provision which the commissioner of public works was to make, and which he did not make; and, in the next place, the ordinance was not followed by vacation of the premises. The case is on all fours, in this respect, with *Witt v. Mayor (supra)*. This case was twice argued and carefully considered (*Schuyler v. Smith*, 51 *N. Y.* 316), and is decisive of the case at bar.

William C. Whitney and *D. J. Dean*, of counsel, for defendant, urged:—I. The resolution proven on the part of the defendant is insufficient to authorize the alleged lease. The resolution purports to be a resolution adopted by the board of supervisors, acting in behalf of the county of New York. The alleged lease was a lease made by the mayor, aldermen and commonalty, which was at the time, May, 1872, a corporation independent and distinct from the county. A lease on behalf of the city can be authorized only by a resolution of its legislative body, to wit: the common council. The city is distinct from the county; that the board of supervisors cannot legislate in behalf of the city, is established by abundant authority (*People v. Edmonds*, 15 *Barb.* 529; *Halstead v. Mayor*, 3 *N. Y.* 430; *Baker v. Mayor*, 9 *Abb. Pr.* 82; *White v. Mayor*, 2 *N. Y. Leg. Obs.* 26).

II. Conceding that the resolution was sufficient to authorize a hiring of the premises in behalf of the county, and that the city has become liable for the debts of the county, the resolution limits the hiring to a term of one year from May 1, 1872, and does not authorize the occupation of the premises named by the recorder beyond that time. The recorder had no power, by his unauthorized act, to impose liability upon the city. It is well settled that no liability can be incurred by the officials of the corporation, payable from the public treasury, except in accordance with the limita-

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tions of law ; and the legislature has been strict and precise in defining the conditions upon which the indebtedness against the corporation can be established. The power to lease real estate for corporate purposes is necessarily inherent in the corporation, to be exercised through the common council, and is limited by section 18 of the charter, providing that the common council should have no power to take a lease of real estate for a period exceeding five years. But no authority is anywhere given to any officer of either the city or county to incur indebtedness for rent of real estate, without the assent of the legislative body of the corporation. As to the period of occupancy of the premises in question by the recorder, subsequently to May 1, 1873, the defendants contend that such occupation was not authorized by any resolution either of the supervisors or of the common council, and such holding over was therefore an individual act of the recorder, unauthorized by law, for which he only, and not the corporation, is responsible. The case of *Farmers' Loan and Trust Company v. Mayor* (8 *Bosw.* 80), is analogous to the case at bar. The judgment in that case was based upon the well established principle that a municipal corporation is not bound by the unauthorized act of its official, which is illustrated in the following cases: *McDonald v. Mayor*, 4 *Super. Ct.* 177 ; S. C., 68 *N. Y.* 23 ; *Burns v. Mayor*, 5 *Id.* 371 ; *Brady v. Mayor*, 20 *Id.* 312 ; S. C., 2 *Bosw.* 173 ; *Donovan v. Mayor*, 33 *N. Y.* 291 ; *Hodges v. Buffalo*, 2 *Denio*, 112 ; *Appleby v. Mayor*, 15 *How. Pr.* 428 ; *Supervisors v. Bates*, 17 *N. Y.* 242 ; *Smith v. Mayor*, 10 *Id.* 538 ; *Ellis v. Mayor*, 1 *Daly*, 102 ; *Bonesteel v. Mayor*, 22 *N. Y.* 162 ; *Dillon on Munic. Corp.* §§ 272-381. Even in a case where the board of supervisors had audited an account presented to them, and the money directed to be paid by such audit had been paid to the claimant thereof, and it appeared that the claim so audited was not a

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legal county charge, it was held that the payment of the money by the county treasurer, as directed by the board of supervisors, was an unauthorized act of the agent of the county, and did not bind the county ; and that an action would lie to recover back the money from the recipient thereof (*Supervisors of Richmond v. Ellis*, 59 *N. Y.* 820). It therefore follows that neither the county of New York, nor the city of New York, could be bound by the unauthorized act of the recorder, and that no claim against them can be predicated upon such act.

III. The act of the recorder in continuing in possession of the premises named, was not only unauthorized by any resolution of the common council, but was in contravention of a specific resolution of the common council, assigning to him other premises for his chambers. When the corporation, by the resolution of the common council designated another place for the chambers of the recorder, the corporation had done all that it was called upon to do through its legislative body, in order to provide the accommodations required for the recorder's business. The resolution repels any presumption of assent on the part of the corporation to the continued occupation of the plaintiff's premises, by the recorder, and also repels any implication of authority existing in the recorder to hold over. That the premises named in the resolution of the common council were not fitted for the occupation of the recorder until June is no legal justification to him in continuing to occupy the plaintiff's premises. It was his business to vacate the plaintiff's premises, and use the premises assigned to him by the common council as well as he could.

BY THE COURT.—SPEIR, J.—The plaintiff claims to recover from the defendants for the use and occupation of the premises in question for the four quarters of the year, from November 1, 1876 to November 1, 1877, as a tenant holding over after the expiration of a

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lease; that the defendants were made liable for the rent of the premises, and that the liability continued under the Revised Statutes relative to tenants holding over.

As the answer puts in issue by a positive denial, the lease claimed to have been executed by them, the first question presented on the threshold of the case is, was any such lease executed? The plaintiff, to prove the lease, gave evidence that he was the owner of the premises for a term of years; that he received from his authorized agent a lease of the premises, executed by the mayor in behalf of the city, hiring them for one year from May 1, 1872, at \$2,000 a year. The authority for executing the lease consisted of a resolution passed by the board of supervisors, May 13, 1872. At that time a lease on behalf of the city could only be authorized by a resolution of the common council, its legislative body. The board of supervisors could act only in behalf of the county of New York, and could not legislate in behalf of the city, which is a corporation independent and distinct from the county (*People v. Stout*, 23 *Barb.* 338; *Baker v. Mayor, &c.*, 9 *Abb. Pr.* 82).

It will not be claimed by the plaintiff's counsel that any liability is incurred by the defendants under the Revised Statutes, by holding over, unless the tenant took possession under a lease legally made, and continued in possession thereunder by permission of the defendant, without notice. The lease was not lawfully executed by any one having authority. Conceding that the resolution was sufficient to authorize a hiring of the premises in behalf of the county, and that the city has become liable for the debts of the county, the authority, by the resolution, limits the hiring to a term of one year from May, 1872, and does not authorize the recorder to occupy the premises beyond that time. The recorder has no authority, by his own inde-

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pendent act, to impose liability upon the city (Board of Supervisors of Richmond County v. Ellis, 59 N. Y. 620). The legislature has distinctly defined the conditions upon which the indebtedness against the corporation can be established. Again, the power to lease real estate for corporate purposes is limited by the 18th section of the charter, and can be exercised only through the common council, and they have no power to lease real estate for a period exceeding five years.

The main reliance of the plaintiff's counsel is upon the proposition that those dealing with the agents of a municipal corporation have no right to presume that they are not acting within the line of their duty, and need not ascertain the nature and source of their authority. Hence the assumption that the recorder, having acquired possession of the premises for a year, either by a written or verbal lease from the board of supervisors, the obligation was continued to the mayor, aldermen, and commonalty, and they therefore became liable for this holding over. The first answer to this is, that there was no authority for the original possession, and the statute relating to the doctrine of holding over has no application. The second answer is, that it is fundamental that those dealing with the agents of a municipal corporation must take care to learn the nature and extent of their authority (*Hodges v. Buffalo*, 2 *Denio*, 110).

There is no presumption of assent on the part of the corporation, in the resolution relied upon, that the occupation of the plaintiff's premises was to be continued, nor does it imply any authority existing in the recorder to hold over.

The plaintiff's exceptions are overruled, and judgment for defendants should be entered on the verdict, with costs.

SEDGWICK, J., concurred.

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HERBERT B. FREEMAN, PLAINTIFF AND RESPONDENT, v. JOHN M. FALCONER, DEFENDANT AND APPELLANT.

PARTY IN INTEREST.

Under the Code, a plaintiff is the real party in interest when he has a valid transfer, and holds the legal title to the demand that is the subject of the action.

It is not necessary that there should be any valuable consideration for the transfer or indorsement of the demand to the plaintiff.

The defendant is fully protected by a payment of the same, on a recovery by the assignee or indorsee of the demand.

The grounds of reversal by the court of appeals, of the case of *Hays v. Southgate* (10 *Hun*, 511), not applicable to this case.

Before SPEIR and FREEDMAN, JJ.

Decided November 3, 1879.

Reargument of appeal from judgment in favor of plaintiff, and from order denying motion for new trial.*

Thomas & Wilder, for appellant.

C. F. Wells, for respondent.

BY THE COURT.—SPEIR, J.—This case comes before us for reargument in pursuance of an order made by the general term of this court, November 4, 1878.

Upon the trial it appeared that the notes in suit were made by the firm of J. M. Falconer & Co., to the order of Manning, Bowman & Co., who especially indorsed them to the plaintiff and directed payment to his order.

The defendant John M. Falconer offered to prove that the payees named in the notes, Manning, Bowman & Co., were the real owners thereof, and that the plaintiff

* See 44 *Super. Ct.* 183, 579.

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iff held them merely as their agent and for the purpose of collecting and remitting the proceeds. The evidence was excluded, and the defendant excepted.

The appellant's motion for a reargument was granted by the general term before whom the case was argued, chiefly on the ground that the case of *Hays v. Southgate* (10 *Hun*, 511), had been reversed by the court of appeals, upon which it was claimed the court relied, and also in view of the later decision of *Taylor v. Sargent*, reported in 6 *Weekly Digest*.

We see no ground for the reversal. The whole case was properly disposed of by the trial judge, and the review and decision of the general term must stand.

The question upon which the reargument was ordered, related to the plaintiff's title, whether he was the real party in interest. A plaintiff is the real party in interest under the Code, if he has a valid transfer as against the assignor, and holds the legal title to the demand. It is not disputed but that the notes were made by John M. Falconer & Co., to the order of Manning, Bowman & Co., who especially indorsed them to the plaintiff. No question was made that they were not delivered to the plaintiff for the purpose of collection. It is not necessary there should be any consideration for the indorsement; the assignors could give the demand to the plaintiff, or sell it to him for a merely nominal consideration, or without any consideration. It is enough that if the plaintiff has the legal title to the demand, the defendant is protected by a payment to and a recovery by the assignee. The questions raised by the decision of the court of appeals reversing *Hays v. Hathorn*, are not presented here. The issue there was that the note was not the property of the plaintiff, for the reason that it had never been transferred to him—that he had no title, legal or equitable, to the note, and no right as owner to the possession. The

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possession here was lawful, for the transfer was made by the assignors for the express purpose of collecting the amount due upon the note.

The judgment and order must be affirmed with costs.

FREEDMAN, J., concurred.

EDWARD S. HAND, PLAINTIFF AND RESPONDENT,
v. GEORGE H. KENNEDY AND WILLIAM I.
HUTCHINSON, IMPLEADED WITH JAMES A.
WILLIAMSON, DEFENDANTS AND APPELLANTS.

In case of promise made to one for the benefit of another, he for whose benefit the same was made may bring an action for its breach; and where a party, for valuable consideration, promises another party to pay a certain mortgage to a third party, who is the mortgagee, the latter may recover, from the party making the promise, upon a breach thereof, without foreclosure of the mortgage, and joining the mortgagor in the action.

Such a promise may be made and enforced without any consideration moving from the mortgagee or third person. Where several parties are liable to the mortgagee in different amounts, under their agreements with each other, an action can be maintained against them all in equity, and a judgment rendered therein, according to the facts established therein against them all, according to their joint or several liabilities.

Before SPEIR and FREEDMAN, JJ.

Decided November 3, 1879.

Appeal by defendants from a judgment of the special term.

The plaintiff, by contract in writing, on November 15, 1871, agreed to sell to the defendants and James A.

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Williamson, for \$44,000, a tract of land in the State of New Jersey, to be paid \$10,000 in cash, and the balance to be secured by bond and mortgage upon the property purchased. On January 8, following, an agreement was entered into between Kennedy, Hutchinson and Williamson, by the terms of which the title to said premises was to be taken in the name of Williamson, he to render an account of the same in the proportions therein specified, Kennedy and Hutchinson to pay their proportion of all moneys which should be necessary to carry out said contract, and for disbursements in preparing said lands for market, and to assume their proportion of the mortgage to be given for the purchase of the same—being Kennedy, one-half; Hutchinson, one-quarter; and Williamson, one-quarter. On June 1, 1872, plaintiff executed and delivered to Williamson a deed of the premises, and took from him, in part payment therefor, his bond to secure \$35,383, and interest secured by a mortgage upon the premises so conveyed. Thereafter all the premises, excepting a "house lot," was laid out into blocks and lots—a number of lots were sold by Williamson—plaintiff releasing them from his mortgage upon being paid a sufficient part of the consideration.

On September 23, 1874, Williamson conveyed, for a nominal consideration, to Kennedy and Hutchinson, their interest in the remainder of this tract, being to Kennedy one-half, and to Hutchinson one-fourth. This deed contained this provision: "The proportional parts of all which," referring, among other things, to the mortgage in question made to plaintiff, "according to the undivided shares and portions of the said parties of the second part to these presents are hereby assumed and agreed to be paid by the said parties of the second part to these presents, as part of the consideration or purchase money for the said undivided shares and por-

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tions of the said lands and premises hereby conveyed, and the same forming a part thereof."

This mortgage was foreclosed in the court of chancery of New Jersey, on May 5, 1877, and the premises sold to the plaintiff for \$12,000, which the court found was a fair value of the premises sold, leaving a balance due of \$12,596.06, for the recovery of which this suit is brought.

Wilson & Wallis, attorneys for appellant; *Hamilton Wallis*, of counsel.

Martin & Smith, attorneys for respondent; *Pennington, Whitehead & M. W. Devine*, of counsel.

BY THE COURT.—SPEIR, J.—By the original agreement between the plaintiff and the defendants the latter became liable and bound to purchase from the plaintiff the whole tract of land, and to pay to him therefor \$10,000 in cash, and secure the balance of the purchase-money by their bond and mortgage. Shortly after this engagement with the plaintiff, the defendants, Kennedy and Hutchinson, entered into an agreement with Williamson, whereby they agreed that he should take the title to the land in his own name—they agreeing to pay their proportion of all moneys necessary to carry out the original agreement to buy of the plaintiff, and Williamson to render an account to them—they agreeing to assume their proportion of the mortgage to be given for the purchase—being, Kennedy one half, and Hutchinson one quarter. The deed from Williamson to Kennedy and Hutchinson was executed and delivered, and by its terms they accept the conveyance from Williamson of three undivided fourth parts of the premises in question, subject to the plaintiff's mortgage thereon, which they assume and agree to pay as part of the consideration or purchase-money for their proportion.

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The promise made by Kennedy and Hutchinson to Williamson, was in effect a promise made by them upon a valid consideration for the benefit of the plaintiff, and comes within the principle illustrated by the example so frequently cited and concisely stated, "That when a promise is made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach." It has been, therefore, well settled that in such a case the action will lie in the name of the creditor for whose benefit the promise was made. The plaintiff here is such a creditor; and it is equally well settled that he may pursue this remedy without foreclosing the mortgage and without joining the mortgagee as defendant.

It is insisted by the defendant that with a full knowledge of all the circumstances in the case, and of the respective rights of the parties on the part of the plaintiff and Williamson, the individual obligation of Williamson was accepted by the plaintiff instead of the joint obligation of the three, and is in effect an accord and satisfaction of all claims against Kennedy and Hutchinson. The answer to this is, there was no controversy then between the parties to settle, nor was the debt secured to be paid to the plaintiff satisfied or attempted to be by any one. It is also urged that under the original agreement the plaintiff was entitled and could have demanded the bond of the three parties for the balance of the purchase-money, and that he chose to abandon his right to accept the individual bond of Williamson, and that, therefore, he has no claim against the other two. It is enough that the plaintiff did not release the defendants from their promise; and whether he could or not is a question not now involved. He could not well discharge the promise before suit made, as it was for the plaintiff's benefit, and, in accordance with legal presumption, accepted by him until his dissent was shown. Under

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the decisions such promise is to be deemed made to the plaintiff, if adopted by him, though he was not a party, nor cognizant of it when made (*Lawrence v. Fox*, 20 *N. Y.* 268); and in *Barker v. Bucklin* (2 *Den.* 45) it is held that a promise so made may be without any consideration moving from the plaintiff.

It is objected that a court of equity has no jurisdiction to hear and determine a case of this character. The subject-matter of the action is the liability of the defendants, under the two agreements and the deed referred to. The plaintiff, in his complaint, relies upon a contract between himself and the defendants, and one between the defendants and the covenants of assumption in the deed, as between them and the plaintiff, in adjusting the equities among the defendants themselves. The cause of action is found in the breaches under the agreements and covenants assumed in the deed. The claim is for a separate judgment against each defendant, and for separate amounts due from each. It seems to me, the mere statement of the case sufficiently shows that the objection is not well taken.

The judgment below must be affirmed, with costs.

FREEDMAN, J., concurred.

EDWARD F. WETTIG, PLAINTIFF AND RESPOND-
ENT, v. FREDERICK C. MOLTZ, JOHN M.
SCHMIDT, IMPEADED, &C., DEFENDANTS AND
APPELLANTS.

SURETIES ON UNDERTAKING UPON ARREST.—JUDGMENT AGAINST,
WHEN SURETIES ENTITLED TO RELIEF FROM, IN EQUITY.

In the case at bar, the defendant Moltz commenced an action in the court of common pleas, against the plaintiff Wettig, and ob-

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tained an order of arrest. Defendants Schmidt and Specht executed with Moltz the usual undertaking. Afterwards, and during the absence of Moltz from the State, Wettig obtained a judgment for costs in the common pleas action against Moltz for non-prosecution, and then commenced this action on the undertaking against the defendants, and obtained judgment therein. After this, Moltz moved in the common pleas, to vacate and set aside the judgment taken by default by Wettig against him, and the motion was granted. Subsequently, the defendants herein moved to vacate the judgment against them in this action, and for a new trial.

Held, by the court, this motion for relief in this action was addressed to the discretion of the court, and should have been granted.

Sureties are always entitled to equitable protection from the courts, and should never be compelled to pay, in a case in which their principal is under no liability.

When Moltz was relieved from the judgment in the common pleas action, the defendants in this action became entitled in equity to relief in this action to an equal extent.

Before SPEIR and FREEDMAN, JJ.

Decided November 3, 1879.

In the month of April, 1871, the defendant, F. C. Moltz, commenced an action of *crim. con.* against the plaintiff herein, in the court of common pleas, for the city and county of New York. The plaintiff herein was arrested, after an undertaking on order of arrest had been executed, which was signed by F. C. Moltz as principal, and F. W. Specht and John M. Schmidt as sureties.

In the month of April, 1871, the defendant, F. C. Moltz, commenced an action for divorce from his then said wife, Augusta B. Moltz, on the ground of her adulterous intercourse with the plaintiff herein, and obtained such divorce May 16, 1871. About this time Moltz, on account of his business, was obliged to leave this city. In April, 1878, a motion was made by the attorney for E. F. Wettig, defendant in court of com-

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mon pleas, to have the complaint dismissed for want of prosecution ; which said motion, no one appearing to oppose, was granted, and the action dismissed. Judgment was thereupon entered against the defendant herein, F. C. Moltz, for costs in common pleas *crim. con.* action, for \$146.07. In May, 1878, an action was commenced in this court by the plaintiff herein, and against the defendants, to enforce their liability on the undertaking ; which, in December, 1878, resulted in a judgment for plaintiff against defendants Schmidt and Specht for 627.01, Moltz not having been served.

On December 31, 1878, a motion was made in the court of common pleas to vacate and set aside the judgment entered by default in favor of the defendant Wettig, and against the plaintiff Moltz, on April 17, 1878, and to allow the plaintiff to come in and prosecute, &c., which motion was, on January 8, 1879, granted.

Thereupon the defendants Schmidt and Moltz moved at a special term of the superior court, that the judgment entered in said court be vacated and set aside and a new trial granted, which was denied, and the defendants, Schmidt and Moltz, appealed.

Fred. W. Diehl, for appellants.

E. A. Acker, for respondents.

BY THE COURT.—FREEDMAN, J.—The judgment entered in this court against John M. Schmidt and F. W. Specht, as sureties upon the undertaking, was regularly recovered. The appeal book discloses no error or irregularity in the proceedings, or other reason for which the appellants could ask to have it vacated as matter of right.

The motion for relief and for a new trial was therefore addressed solely to the discretion of the court.

By the undertaking in question the obligors bound

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themselves that if Edward F. Wettig, the defendant in the action brought in the court of common pleas, should recover judgment therein, Frederick C. Moltz, the plaintiff, would pay all costs which might be awarded to said defendant, and all damages which he might sustain by reason of the arrest; and when, in consequence of the dismissal of the plaintiff's complaint for want of prosecution, the defendant Wettig did recover a judgment for costs, and Moltz failed to pay the same, the obligors who had executed the undertaking became *prima facie* liable. But this liability is not an absolute one, if the judgment thus recovered by Wettig does not represent a final determination of the rights of the parties to that action.

As long as the parties acquiesced in it, no obstacle existed to the prosecution of a suit upon the undertaking. The court of common pleas, however, had the power, in its discretion, to vacate the judgment and to allow the plaintiff to come in and prosecute, and for cause shown this power was exercised and the judgment vacated. If this had happened before the commencement of the action in this court, the appellants, upon being sued, could have set it up by answer as a defense. If it had happened after issue joined, the court might have allowed them to set it up by way of supplemental answer. It happened, however, after the recovery of the judgment in this court. This circumstance constituted no bar to the motion made below, but only went to the question of terms.

In my judgment, relief in some form should have been granted. Sureties are always entitled to equitable protection, and they should not be compelled to pay in a case in which their principal is under no liability. Even in the case of a suit brought on an undertaking on appeal to the general term, where, under the provisions of the former Code, as they existed prior to 1862, the fact of the perfection of a further appeal to

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the court of appeals, and the procurement of a stay thereby, in the original action, could not be pleaded in bar or in abatement of the action on the undertaking, the sureties were usually relieved by an order staying proceedings in the latter action.

In the case at bar not only was the judgment against Moltz, the plaintiff, vacated by the court of common pleas, and the plaintiff allowed to come in and prosecute, but the action was thereupon prosecuted to a final determination, and such prosecution resulted, as was conceded on the argument, in a judgment for said plaintiff. The judgment in the court of common pleas could be vacated on the motion of Moltz only, and as soon as it was vacated Schmidt made an application to this court, in which Moltz joined. No laches are attributable to Schmidt, because, as long as the judgment against Moltz remained upon the record, he could not move. But when Moltz was relieved, Schmidt, in equity, became entitled to relief to the same extent.

The order appealed from should be reversed with costs, and the motion for the vacation of the judgment and for a new trial should be granted upon payment of the costs of the action, less the costs of this appeal, with leave to the appellants to make and file a supplemental answer, setting forth the vacation of the judgment by the court of common pleas, and with leave to the plaintiff to discontinue the action, without costs, if he should be so advised.

SPEIR, J., concurred.

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PHILIP HERRMAN, PLAINTIFF, v. THE ADRIATIC
FIRE INSURANCE COMPANY, DEFENDANT.

INSURANCE POLICY.

In the case at bar the policy covered several buildings and their contents, and contained this clause: "If the above-mentioned premises shall become vacant or unoccupied, and so remain for more than thirty days, without notice to and consent of this company in writing . . . this policy shall be void."

It appeared that the dwelling-house that was destroyed by fire had been unoccupied, so as to fall within this clause, while another building, used as a dwelling-house, and *forming a part of the premises insured*, had been occupied continuously.

Held, by the court, that the word "premises," in this condition or clause of the policy, covers the whole property insured—dwellings, out-houses and appurtenances together forming one establishment—and unless the *whole* premises became unoccupied, the condition of the policy remained unbroken.

The meaning and effect of the words "occupied" or "unoccupied," considered and discussed, and the cases and decisions bearing upon the same fully reviewed and discussed in the opinion of the court.

Before SEDGWICK and FREEDMAN, JJ.

Decided November 3, 1879.

Exceptions ordered to be heard at general term, in the first instance, upon the direction of a verdict for the defendant.

N. B. Hoxie, attorney, for plaintiff.

Foster & Thomson, attorneys, for defendant.

BY THE COURT.—FREEDMAN, J.—At the trial a verdict was directed upon the evidence of the plaintiff, in favor of the defendant, and plaintiff's exception to such ruling was ordered to be heard in the first instance at the general term. This disposition of the case presents for review the single question, whether, upon plaintiff's own showing, it affirmatively appeared

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that, on the day of the occurrence of the fire, the insured premises were vacant or unoccupied, and had been so for more than thirty days prior thereto, within the meaning of the prohibitory clause of the policy.

The language of the clause is : "If the above-mentioned premises shall become vacant or unoccupied, and so remain for more than thirty days, without notice to and consent of this company in writing, . . . this policy shall be void."

The facts of the case, with the exception of the language of the policy, do not materially differ from the state of facts presented by the same plaintiff in his action against the Merchants' Insurance Company, recently decided by this court. The words of the policy there were, that the policy should become void in case the insured premises should be "vacant *and* unoccupied, &c.," and in view of the use of the copulative conjunction it was held that, inasmuch as vacancy and non-occupation had to concur to avoid the policy, and the premises were not shown to have been vacant, however the fact may have been with regard to their occupation, the direction of the verdict in favor of the plaintiff constituted a proper determination of the issues (44 *N. Y. Super. Ct.* 444.)

The decision referred to calls upon us to hold that the state of facts existing in the case at bar is not sufficient to constitute a vacancy within the meaning of the policy, and the only question remaining is, whether the premises were shown to have been left unoccupied.

The meaning of the word "unoccupied" necessarily varies with its use in different policies, and to determine it correctly in a particular instance, regard must be had to the intention of the parties as expressed by the particular policy, and the subject-matter in respect to which the term is used.

Thus, in *Keith v. Quincy Mutual Fire Insurance Company* (10 *Allen*, 228), which was an action brought

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upon a policy of insurance upon a wooden building used as a trip-hammer shop, and in which the defense interposed was non-occupancy for over thirty days, by which the policy by its terms became void, the court charged as follows :

"It is not sufficient to constitute occupancy, that the tools remained in the shop, and that the plaintiff's son went through the shop almost every day to look around and see if things were right ; but some practical use must have been made of the building, and if it thus remained without any practical use for the space of thirty days, it was, within the meaning of the policy, an unoccupied building for that time, and the policy became void."

On appeal this view was sustained, and the exceptions overruled.

In *Paine v. Agricultural Ins. Co.* (5 *T. & C.* 619), the policy provided, that in case the premises should be sold and possession given, or the house left unoccupied, without giving immediate notice to the company, the policy shall cease, and be of no force and effect ?

The plaintiff having been separated from his wife, and being in ill health, left the dwelling-house insured, in the middle of January, and removed to the house of his son, in Albion, about twenty miles distant, and continued to board with his son until March 30, when the fire occurred. No one inhabited the dwelling-house during plaintiff's absence, except one night, when the plaintiff slept there. Plaintiff, on his removal to Albion, left all his household goods and effects in the house in the same condition as when he lived in it, and during his absence visited the house on different occasions, and maintained a general supervision over it.

The referee, on this state of facts, held that the house was not unoccupied, within the clause of the policy.

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On appeal this was held error, and a new trial was ordered. In delivering the opinion of the court on that occasion, MULLIN, J. says :

"Occupation of a house is living in it, not mere supervision over it. It is not necessary that some person should live in it every moment during the life of a policy containing such provision as is contained in the policy before us, but there must not be a cessation of occupancy for any considerable portion of time. For what length of time it may remain unoccupied will depend upon the circumstances of each case, and the jury or the referee must determine the question, in view of the consideration that led to the incorporation of the provision into the policy, and the necessity that not unfrequently arises for persons insured to leave temporarily their dwelling-houses. As the policy requires *immediate* notice of the cessation of occupancy, the abandonment of the premises must be very short indeed, that will not work a forfeiture of it, &c., &c."

In *Cummins v. Agricultural Ins. Co.* (67 N. Y. 260), the policy contained the following provision : "If the dwelling-house or houses hereby insured become vacated by the removal of the owner or occupant, this policy shall be null and void." The court of appeals held that there was a material distinction between this provision and the provision in *Paine v. Agricultural Ins. Co.* ; that in the case of *Paine* the mere fact that the house was left unoccupied was sufficient to avoid the policy, according to its express terms, unless immediate notice were given ; but that in the case of *Cummins*, the condition was superadded that it must have been vacated by the removal of the owner or occupant, and that these words referred to a permanent removal and entire abandonment of the house as a place of residence.

Ashworth v. Builders' Ins. Co. (112 Mass. 422), was

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an action of contract upon a policy of insurance against loss by fire on a "dwelling-house" and a "barn near by." The application described the premises as used by the assured for farming purposes. The policy provided that "buildings unoccupied are not covered by this policy, unless insured as such." The dwelling-house was only used by the assured and his servants, for the purpose of taking their meals there when engaged in carrying on a contiguous farm, and the barn was only used for the purpose of storing hay and farming tools. COLT, J.: "The policy expressly declares upon its face, that buildings unoccupied are not covered, unless insured as such. This is descriptive of the subject-matter of the insurance. It is a stipulation on the truth and fulfillment of which the contract depends, and the insurer has a right to insist on a strict compliance. It is decisive of this case . . . for the facts stated do not show an occupancy of either the house or barn, within the meaning of the policy. Occupancy, as applied to such buildings, implies an actual use of the house as a dwelling-place, and such use of the barn as is ordinarily incident to a barn belonging to an occupied house, or at least something more than a use of it for mere storage.

"The insurer has a right, by the terms of the policy, to the care and supervision which is involved in such an occupancy."

Judgment was given for the defendant.

In the case of *Gibbs v. Continental Fire Ins. Co.* (13 *Hun*, 611-620), the policy contained a provision, that should the premises become unoccupied, without the consent of the company, this policy shall be void. The plaintiff had slept at night, for some time, but for how long did not clearly appear, at the house of her daughter, which next adjoined that occupied by the plaintiff, but she had never abandoned the premises, and, although lodging at her daughter's house, her fur-

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niture and wearing apparel were left at her own. She returned daily to the premises insured, and spent the day there. It was held the house was not unoccupied within the meaning of the policy.

In the case at bar, and by the policy in question, the Adriatic Fire Insurance Company insured the plaintiff against loss or damage by fire or lightning, to the amount of \$7,575, as follows :

“\$2,000 on his two-story and attic frame dwelling-house, and three-story tower thereon; slate roof, 28 x 37 feet, and two-story and attic slate-roof addition, 16 x 17 feet.

“\$750 on household furniture, useful and ornamental, linen, beds, bedding, plate, plated ware, printed books, wearing apparel, and family stores contained therein.

“\$350 on frame wash and woodhouse, kitchen and privy, about 40 feet in rear of the above-described dwelling.

“\$1,500 on barn and sheds attached.

“\$750 on carriage-house.

“\$400 on frame dwelling.

“\$150 on outbuildings, detached, about 100 feet; situate in the town of Lloyd, Ulster county, N. Y., being about one mile south from Highland Village.

“\$250 on produce in barn and on premises.

“\$75 on live stock; in case of loss, not more than \$50 to be paid for any one cow.

“\$500 on four horses, being \$125 on each horse.

“\$400 on one carriage; \$150 on one carriage.

“\$150 on two open carriages, being \$75 on each.

“150 on three sets of harness, being \$50 on each, all contained in above carriage-house and premises.”

The premises thus insured constituted plaintiff's farm and summer residence. The farm was managed

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by a farmer in plaintiff's employ, who received as part of his compensation the use of the smaller dwelling mentioned in the policy, and who, with his wife and children and a gardener, lived upon it throughout the entire year. The plaintiff, who does business in the city of New York, with his wife and children, actually lived upon it during the summer and part of the fall only. About November 20, 1876, the plaintiff, with his family, left the premises and returned to his city residence to remain there for the winter, leaving in the main dwelling mentioned in the policy his piano and all his furniture, cooking utensils, beds, mattresses, and the summer clothing of himself and family. All the premises insured and the property remaining therein were left in charge of the farmer. As already stated, this farmer and his family resided in the frame dwelling mentioned in the policy, and during the absence of the plaintiff and his family they had permission to live in the main dwelling, of which they had the key. It was the particular duty of the farmer to see that the main dwelling, which could be seen from the farmhouse, was well ventilated and properly watched, and he, or some member of his family, regularly once a week did go into and through it, and open all the windows for the purpose of ventilation. The house was then carefully closed again, the windows bolted on the inside and firmly secured, and the outer door locked, and, thus secured, the house was left for the ensuing week. The plaintiff, generally in company with his wife, visited the premises once a fortnight, to see that the farmer took good care of them. The plaintiff was in the habit, on these visits, of opening the main dwelling, going through the rooms, and everything therein; but neither he nor his wife, nor any other member of his family, passed a night in the house during the winter preceding the fire. About three days before the fire the plaintiff and his wife

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were there, on one of their usual visits, and with painters, going through the house with them and giving directions as to the painting to be done. On April 8, 1877, while the premises were used, watched and guarded as aforesaid, a fire occurred, by which the main dwelling with its furniture, and the washhouse, kitchen and privy in the rear were destroyed, the loss exceeding the amount of the insurance.

Upon this state of facts it seems clear that, if the buildings destroyed were, at the time of the fire, in fact unoccupied, within the true meaning of the clause of the policy, and had so remained for the space of thirty days, the intention of the plaintiff to return to them as a summer residence is wholly immaterial. True, the clause of the policy is to be construed in view of the situation, and the character of the property described in the policy, and the ordinary incidents and contingencies affecting the use to which the property, and other property of like character and similarly situated, is subject, and hence, though it has been held that occupation of a dwelling-house is living in it, it has also been held that the same construction cannot be applied to a saw-mill, church building or school-house, described as such in the policy (*Whitney v. Black River Ins. Co.*, 72 N. Y. 117).

But the buildings in question were not described in the policy as a summer residence, nor is there any proof in the case upon which the company can be charged with knowledge of their precise character and use. The construction of the clause cannot, therefore, be limited by any such consideration.

If, therefore, the policy in question only covered the main dwelling, or if, covering, as it does, severally, buildings ostensibly used for dwelling purposes, it provided that, if any one of these buildings should become unoccupied, and so remain for more than thirty days, without notice to and the consent of the company in

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writing, the policy should be void as to the building so becoming and remaining unoccupied, there would, upon the evidence, and such of the authorities as seem to hold that in such a case the occupation called for is an occupation in the popular, and not the legal, sense of the term, be room for argument that, at least as to the main dwelling, the policy had ceased to exist. It may also be conceded, as a general rule, that if, under a policy, the contract of insurance comes to an end with regard to the main dwelling, by reason of non-occupation, it also comes to an end with regard to such of the outbuildings as are so connected with the main building that they cannot be deemed occupied for any practical purpose as long as the main building is and remains unoccupied.

But the difficulty in the present case is that the word "premises" covers the whole property insured, dwellings, outhouses, and appurtenances, together composing one establishment, the farm of the plaintiff; and unless the whole premises became unoccupied, the condition was not broken. The condition is invoked to create a forfeiture, and in such a case the rule is that it is to be strictly construed against the underwriter. The precise question arose in *Bryan v. Peabody Ins. Co.* (8 *West Va.* 605). The policy was upon "a two-story frame building, standing on leased ground, 25x50 feet; also one-story frame, 12x16 feet, occupied as a hardware store and dwelling, situated in the town of Antwerp, Clarion county, Pa., and stock of merchandise, consisting principally of hardware, oil-well supplies, and pipe-coupling machines, all contained on first floor of the above building." The clause as to vacancy or non-occupation was precisely like the one now before the court, and the proof showed that the dwelling part of the building, last described, had become and remained vacant for more than thirty days preceding the fire. In delivering the opinion of the supreme

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court of appeals, MOORE, J., says: "The clause must be construed to mean and apply to the whole or entire premises as to its becoming vacant or unoccupied, and not merely to a part thereof. Had the company intended otherwise, it is reasonable to suppose it would have so declared. It would not have contented itself with the general and comprehensive expression, 'above-mentioned premises,' but would have manifested its meaning and intention in common and plain language, such as *above-mentioned premises or any part thereof*. Thus impressed, I hold that Bryan did not violate his contract in not giving notice of the vacating of a part of the premises."

I can perceive no reason why a different rule should prevail in the case at bar. Such, then, being the construction to be placed upon the contract, and it appearing that the farmer and his wife and children, and the gardener, were upon the farm and in charge of the same as above stated, at the time of the fire, and had actually and continuously lived upon part of the insured premises for more than thirty days preceding the fire, while engaged in guarding the whole, the conclusion is unavoidable that the premises were not unoccupied within the meaning of the policy, and that it was error to direct a verdict for the defendant. For the same reasons, a simple dismissal of the complaint would have been equally erroneous.

Plaintiff's exceptions must be sustained, the verdict set aside, and a new trial ordered, with costs to the plaintiff to abide the event.

SEDGWICK, J., concurred.

Statement of the Case.

**THE BANK FOR SAVINGS IN THE CITY OF NEW
YORK, PLAINTIFF AND RESPONDENT, v. MARTIN
FRANK, DEFENDANT AND APPELLANT.**

**MORTGAGES ON REAL ESTATE—PRIORITY OF LIEN, AS BETWEEN TWO
UPON THE SAME PREMISES, BY AGREEMENT OF PARTIES IN INTEREST
—BONA FIDE PURCHASERS OF—RECORDING ACT.**

An assignee of a mortgage must take it subject to the equities attending the original transaction, and such equities may exist in favor of the mortgagor, or in favor of third persons (*Trustees Union College v. Wheeler*, 61 N. Y. 88; *Greene v. Warwick*, 64 *Id.* 220; *Crane v. Turner*, 67 *Id.* 437). The assignee cannot defeat such equities by showing that he is a *bona fide* purchaser for a valuable consideration. It is immaterial that he had no notice of their existence at the time of the assignment.

But where a mortgage had a valid inception as a subsisting and enforceable lien in the hands of the mortgagee, to the full extent of its face, equities arising thereafter stand upon a different footing, and must be disposed of upon such other principles of public policy, or according to such statutory requirements, as the facts of the particular case may call for (See cases cited and discussed in the opinion).

An assignment of a mortgage is a conveyance within the meaning of the statute, and since the Revised Statutes of 1830, the first assignee of a mortgage, in order to protect himself against a subsequent *bona fide* purchaser of the mortgage (whose assignment may be first recorded), must record his assignment (*Vanderkemp v. Shelton*, 11 *Paige*, 28, and *Campbell v. Vedder*, 3 *Keyes*, 174).

The protection of the statute extends only to purchasers in good faith and for a valuable consideration, parted with on the strength of the conveyance (*De Lancy v. Stearns*, 66 N. Y. 157); nor is the parting with such valuable consideration sufficient in the absence of good faith, which cannot be said to exist in case of notice of a prior conveyance, &c.

In the case at bar, an agreement for a valuable consideration was made between the plaintiff and defendant's assignor, by which defendant's said assignor agreed to waive the priority of his mortgage upon the premises in question (being the mortgage thereafter sold by him to defendant), in favor of a mortgage to be given upon the same premises to the plaintiff.

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Held, that such an agreement is not entitled to be recorded under the statutes, and if recorded, is not constructive notice to any one; but if so entitled, it should be recorded in the book of mortgages. Whether such a contract as the above, which stands unrecorded in law, does, in view of the facts in this case, run with the mortgage, so that the mortgagee cannot subsequently assign, even to a *bona fide* purchaser for full value, more than his own rights, *quære*.

But the court held, in the case at bar, that the knowledge the defendant had of the above agreement, through his attorney, was equivalent in law to notice.

Before SEDGWICK and SPEIR, JJ.

Decided November 3, 1879.

Appeal by defendant from judgment of the special term. The facts of the case sufficiently appear in the opinion of the court.

A. H. Wagner, for appellant.

Strong & Cadwalader, attorneys for respondent;
John L. Cadwalader, of counsel.

PER CURIAM.—Judgment affirmed, with costs, upon the opinion of Judge FREEDMAN at special term.

The following is the opinion of the court below :

THE BANK FOR SAVINGS in the
City of New York,

v.

MARTIN FRANK, and others.

MARTIN FRANK

v.

THE BANK FOR SAVINGS, and
others.

AT SPECIAL TERM.

FREEDMAN, J.—These two actions, which were tried

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together, were commenced to foreclose mortgages on the same property, and the question between the Bank for Savings and Martin Frank, as the holders of the mortgages, is, which of the said mortgages shall have priority. There can be no doubt that the real agreement between the bank and Wolff, the assignor of Frank, was that Wolff should waive the priority of his mortgage upon the premises in question in favor of a mortgage to be given by Eppensteiner to the bank upon the same premises, to secure the payment of the sum of \$7,000.

To carry such agreement into effect, Wolff, on November 15, 1869, for a valuable consideration, executed under his hand and seal, and delivered to the bank, an instrument in writing, purporting to contain such waiver, which was recorded November 22, 1869, in Liber 1113 of Conveyances, page 625.

Upon the faith of said agreement and instrument, the bank advanced to Eppensteiner the said sum of \$7,000, and out of that amount the sum of \$5,827.62 was used in paying off and discharging a mortgage upon the same premises, held by Phillip C. Harmon, and others, which was prior in point of date and record to Wolff's mortgage. As the real agreement for the purposes of these actions must be deemed to have become merged in the written one, it is important to consider what rights the bank acquired under and by virtue of this written instrument and the recording thereof, as against a subsequent assignee of Wolff's mortgage, whose assignment was duly recorded.

In terms and effect it was a mere personal contract between two holders of mortgages for the postponement of one mortgage to the other.

No interest in the mortgaged premises, nor any right, title or interest in or to the prior bond and mortgage, was transferred thereby.

It did not operate as a release, for the whole premises continued subject to Wolff's mortgage.

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It was, in substance, a stipulation as to the law of the case, not as regards anything entering into or affecting the debt or the security—for both the debt and the lien of the mortgage were to remain, but in relation to priority simply.

Such an agreement was held to be one that is not entitled to be recorded under the statute, and hence the record thereof is not constructive notice to anybody (*Gillig v. Maass*, 28 N. Y. 191).

But if it had been thus entitled, it should have been recorded in the book of mortgages, and not in the book of conveyances, in order to make the record effectual as against subsequent *bona fide* assignees or purchasers from the mortgage, for the statute (1 R. S. 756, § 2) directs that different sets of books shall be provided for the recording of deeds and mortgages, in one of which sets all conveyances absolute in their terms and not intended as mortgages, or as securities in the nature of mortgages, shall be recorded, and in the other set such mortgages and securities shall be recorded (*Ib.*).

Moreover, the mortgage whose priority Wolff has agreed to waive, was a mortgage recorded on April 1, 1868, in Liber 258 of Mortgages, page 258; but this mortgage he described in the written instrument as a mortgage recorded on April 16, 1868, in Liber 1049 of Mortgages, page 261.

In no aspect of the case, therefore, can the bank derive any benefit from the mere recording of the said written instrument as against Martin Frank as subsequent assignee of Wolff, whose assignment was duly recorded, provided Frank was a purchaser in good faith and for a valuable consideration. It is insisted, however, that Martin Frank could only buy what Wolff had to sell, and that he stands in the latter's shoes.

The general rule undoubtedly is, that a seller or assignor of chattels or choses in action, can give no

Opinion of FREEDMAN, J., at Special Term.

other or better title than he himself has; and that the purchaser or assignee must be content to stand in his place, and to accept his title; and that consequently one who takes an assignment of a bond and mortgage as Mrs. Burchard did, in *Shafer v. Reiley* (50 *N. Y.* 61), takes it subject not only to any latent equities that exist in favor of the mortgagor, but also subject to the like equities in favor of third persons and strangers.

In the case last referred to, whatever vitality the mortgage had, was by reason of the purchase of it by, and the assignment to, Mrs. Burchard. It took effect only as a mortgage by its delivery to her, and hence it was held that she took it subject to Griffin's mechanic's lien, which had been perfected pursuant to the statute, prior to that time.

In *Trustees of Union College v. Wheeler* (61 *N. Y.* 88), which was a case of inherent equity as between a purchaser having, under a certain contract, an interest in the equity of redemption, and the mortgage, it was held, upon such inherent equity, that the mortgage was never any other than a lien, subordinate to the rights of the purchaser, and that for this reason, the plaintiff, as assignee of the mortgage, acquired no other or greater rights. The true test, said DWIGHT, C., is to inquire what the mortgagee can do by way of enforcement of it against the property mortgaged; what he can do, the assignee can do, and no more.

In *Greene v. Warwick* (64 *N. Y.* 220), it was held that where two mortgages are executed at the same time, and upon an agreement that they shall be and remain equal liens in all respects upon the premises, an assignee of either of them takes it subject to all the equities arising out of the agreement in favor of the holder of the other, and that in such a case prior record is of no avail, because neither mortgage is a subsequent conveyance within the meaning of the recording act. In reaching this conclusion, and commenting upon the

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authorities, the test case laid down by DWIGHT, C., in the case of the Trustees of Union College v. Wheeler (*supra*), is specifically referred to in Crane v. Turner (67 N. Y. 437). Pierce had executed a mortgage upon premises of which he had possession, under a contract of sale; and after receipt of a deed, he conveyed the premises and received from the grantee, who had notice of the prior mortgage, a mortgage for a part of the purchase money. Pierce then assigned his mortgage to the defendant Turner, assuring him that the mortgage was the first lien. In an action to foreclose the first mortgage, Turner claimed that his mortgage was entitled to priority. Both mortgages having been duly recorded, it was held, upon the authority of the preceding two cases above referred to, (1) that as Pierce would be estopped from claiming a priority if he had retained the mortgage, his assignee had no superior right, and was also estopped; and (2) that the recording act did not aid the defendant.

The principle, therefore, as was said by MILLER, J., in delivering the unanimous opinion of the court of appeals in the case last cited, is settled beyond peradventure, that an assignee of a mortgage must take it subject to the equities attending the original transaction, and the true test is as stated by DWIGHT, C., in the Trustees of Union College v. Wheeler (*supra*), such equities may exist in favor of the mortgagor, or in favor of third persons.

But this general rule does not extend to equities other than such as attend the original transaction. They must exist at the time of the inception of the mortgage—at the time it springs into life. In all such cases the assignee takes subject to them, and he cannot defeat them simply by showing that he is a *bona fide* purchaser for a valuable consideration. In all such cases it is immaterial that he has no notice of their existence at the time of the assignment.

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But where a mortgage had a valid inception as a subsisting and enforceable lien in the hands of the mortgagee to the full extent of its face, equities arising thereafter stand upon a different footing, and they are to be disposed of upon such other principles of public policy, or according to such statutory requirements as the facts of the particular case may call for.

The cases which are most familiar, as falling within this class, are cases presenting conflicting claims under different successive assignments of the same mortgage by the mortgagee. They were usually determined according to the legal maxim, that, where one or two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one whose act or culpable negligence enabled the commission of the fraud; even the decisions of such as were determined upon the provisions of the statute relating to the proof and recording of conveyances of real estate and the canceling of mortgages, rest to a large, but sometimes not apparent, extent, upon this maxim, for the very first section of that statute is but a reiteration, in the form of a legislative enactment, of the great principle underlying the maxim.

The statute provides, that every conveyance of real estate shall be recorded, as prescribed by it; and that every conveyance, not so recorded, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance shall be first duly recorded (§ 1).

The term "conveyance," as thus used, embraces every instrument in writing, by which any estate, or interest in real estate, is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected, in law or equity; except last wills and testaments, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands (§ 38).

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And the term "purchaser," as thus used, embraces every person to whom any estate or interest on real estate shall be conveyed, for a valuable consideration, and also every assignee of a mortgage or lease, or other conditional estate (§ 37).

This statute applies only to successive purchasers from the same seller, and the record of the assignment of a mortgage is constructive notice only of such assignment as against subsequent assignees of the mortgage (*Gillig v. Maass*, 28 N. Y. 191; *Purdy v. Huntington*, 42 *Id.* 334, 338, 347).

That an assignment of a mortgage is a conveyance within the meaning of the statute, and that, in order to protect himself against a subsequent *bona fide* purchaser of the mortgage, whose assignment may be first recorded, the first assignee, since the Revised Statutes of 1830, must record his assignment, has been held in *Vander Kemp v. Shelton*, 11 *Paige*, 28; *Campbell v. Vedder*, 3 *Keyes*, 174.

Although, therefore, as to the mere holder of a subsequent mortgage, the record of a prior mortgage is sufficient notice of its existence, and of the rights of the assignee thereof, though the assignment of the prior mortgage be not recorded, and although such non-recording does not affect the rights of the holder thereof against subsequent purchasers of the premises, who are bound by the previously recorded mortgage, no matter who holds it, yet, as against a subsequent purchaser in good faith and for a valuable consideration from the mortgagee, whose assignment is first recorded, such holder's rights are postponed, because, by omitting to record his assignment, he fails to give what under the statute should have constituted constructive notice of his rights, to all subsequent assignees of the mortgagee.

So it was held that where a party takes a mortgage with notice of a prior unrecorded mortgage, and with

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the understanding that he is to take his mortgage subject to the previous one, he cannot claim priority ; but that his *bona fide* assignee is as much protected as if no notice had ever existed (Jackson *dem.* Hyer v. Van Valkenburgh, 8 Cow. 260). This doctrine was recognized in Fort v. Burch (5 Den. 187), with the qualification only that the assignment must be recorded before the prior mortgage is recorded, and with this qualification it has remained good law ever since.

In Gillig v. Maass (28 N. Y. 191), it appeared that at the time the agreement was made between Walber, the original mortgagee, and Jones, as a junior mortgagee, whereby Walber undertook to waive priority in favor of Jones, Walber was no longer the owner of the mortgage, or that he had any interest therein, he having assigned the same to a *bona fide* purchaser. As he had no title whatever left, nor any apparent right to act for such *bona fide* purchaser, and the latter having done nothing to mislead Jones, it was held, that although the assignment was not at that time recorded, Jones treated with Walber at his peril.

The foregoing review of authorities sufficiently shows how discriminating and careful the courts have been in cases of conflicting equities arising after the inception and during the life of a mortgage, to cast the loss, if any, upon the party at fault.

On the other hand, the protection of the statute extends only to purchasers in good faith and for a valuable consideration. Good faith is not enough without a valuable consideration parted with on the faith of the conveyance (De Lancy v. Stearns, 66 N. Y. 157), nor is the parting with such valuable consideration sufficient in the absence of good faith, which cannot be said to exist in case of notice.

The law being as stated, and it having already been shown that the bank can derive no benefit from the mere recording of the written agreement as against

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Martin Frank, as subsequent assignee of Wolff, whose assignment was duly recorded, the question remains to be considered whether Frank was a purchaser in good faith, and for a valuable consideration, and if he was, upon whom, in view of all the facts of the case, the loss which may arise shall be cast.

At the time of the execution of the agreement between Wolff and the bank, Wolff was the true and lawful and undisputed holder of the mortgage, which he subsequently assigned to Frank, and as such he had full power to dispose of it, or any specific portion of it.

But no such disposition was made in favor of the bank. He parted with no part of the title. In terms and legal effect, as already shown, the agreement was a mere personal contract, collateral to, but not entering into the mortgage or mortgage debt, or affecting the mortgaged premises, or any part thereof.

Consequently, if it were necessary to determine with precision, whether this contract, which stands unrecorded in law, ran with the mortgage in such a way that Wolff could not subsequently assign, even to a *bona fide* purchaser for full value, more than his own rights, or whether such a purchaser could, by assignment, acquire title to the mortgage free and clear of the personal stipulation, such determination, in view of all the facts of this case, might be attended with difficulty, and a decision either way might perhaps be confronted with some apparent authority to the contrary, and meet with some logical difficulties, especially as Wolff appears to have been just as innocent of intentional fraud or wrong-doing as Frank and the bank were.

But such determination is unnecessary, if Frank did not purchase in good faith, and for a valuable consideration, within the meaning of the law upon this branch of the case: it seems to me that I am compelled to hold that he was not a purchaser in good faith.

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Wolff had demanded from Dilger and Raichle, the makers of the mortgage, payment of the mortgage, and had threatened foreclosure, when they agreed to buy it for the purpose of foreclosing it themselves. They were advised to take the assignment in the name of a third party, and they finally induced Frank, who is a step-brother of Raichle, to purchase it for a consideration of \$1,000, to be paid by two notes payable within six and twelve months respectively. At that time the sum remaining due thereon amounted to \$1,824.61.

They knew of Wolff's agreement with the bank, though they had never consented to or ratified it, and they assured Frank, as the latter swears, that the mortgage he was about to buy was all right, and a first mortgage. Now, Frank swears that before he accepted the assignment, and gave his notes, he retained A. H. Wagner, who had been, and for all that appears, then was the attorney and counsel of Dilger and Raichle, to search the title for him, and by the testimony of Strong it is established that Wagner did search the title, and found the agreement on record as above stated, although, whether he searched for Dilger and Raichle, or Frank, is not quite clear. But at all events, it sufficiently appears, that at about 12 o'clock at noon, on April 23, 1878, at which time Frank concedes the relation of attorney and client existed between himself and Wagner, the latter had an interview with Strong, the attorney of the bank, during which the agreement between Wolff and the bank, and the errors in the recording thereof, were discussed between them, and that Frank took his assignment, and parted with the consideration therefor, subsequent to said interview, and put the said assignment on record at 3.45 P.M. on that day. Wolff and Frank had not met before that day, and no communication of any importance ever passed between them, either before or at the close of the transaction resulting in the assignment. So far there is no conflict in

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the testimony, nor any room for doubt, for Wagner was not called as a witness to contradict either Strong or Frank. On the contrary, it was admitted, for the purposes of the trial, that Strong's testimony is true. Frank, therefore, though his attorney, must have had knowledge of the true state of affairs, unless he was a mere dummy for Dilger and Raichle, and as such had agreed not to know anything. He swears, however, that he purchased the bond and mortgage in question for his own account, and that at the time of such purchase, and the acceptance of the assignment, he was ignorant of the existence of any agreement whereby Wolff had consented to waive the priority of that mortgage. That may have been so; and there being nothing in the case which compels me to disbelieve him upon this point, I shall assume that it was so; but in view of the other uncontroverted facts, it is not enough. Though he may have been personally ignorant, all the cases agree that the knowledge which his attorney had before the final close of the transaction, as above stated, was in law equivalent to notice to him (*Bank of United States v. Davis*, 2 *Hill*, 451; *Ingalls v. Morgan*, 10 *N. Y.* 178, 184, 185; *Dillon v. Anderson*, 43 *Id.* 231, 238; *The Distilled Spirits*, 11 *Wall.* 356).

Having, therefore, purchased, with notice of the rights of the bank, he cannot be held to have been a purchaser in good faith, though he may have parted with a valuable consideration.

The bank is, therefore, entitled to a finding setting forth this fact; to an adjudication that it has a lien upon the mortgaged premises for the whole of the principal sum of \$7,000, and the interest thereon from August 15, 1877, superior to the lien of Martin Frank, by virtue of his said mortgage; and to the usual decree of foreclosure to carry this adjudication into effect.

The only remaining question relates to the liability

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of Raichle and Dilger, as original mortgagors for a possible deficiency under the mortgage held by Frank.

That mortgage was executed by them to Julius T. Wolff, March 31, 1868.

Subsequently, namely, by deed, dated April 14, 1868, they conveyed the mortgaged premises to Charles A. Buddensick, who, by deed, dated March 1, 1869, conveyed them to Frederick Eppensteiner. Both Buddensick and Eppensteiner took title subject to Wolff's mortgage, and assumed the payment thereof. In equity, therefore, Raichle and Dilger became sureties for the payment of such mortgage from the time of their conveyance to Buddensick, and any subsequent agreement between the holder of the mortgage and the owner of the equity of redemption, or the holder of another mortgage, altering the manner of the payment of the first-named mortgage; or lessening the security afforded by the mortgaged premises for the payment of such mortgage, which was made without their consent, or remains unratified by them, releases them from the obligations of such suretyship (*Caloo v. Davis*, 8 *Hun*, 222; affirmed by the court of appeals).

That the agreement between Wolff and the bank was an agreement of this character, is not disputed. It was made upon a sufficient and valid consideration, and its effect was to materially lessen the security afforded by the mortgaged premises, and consequently to increase the responsibility of the mortgagors. And having been made, as the evidence shows, without the knowledge or consent of such mortgagors, and remaining unratified by them, it discharges them from all personal liability in the premises. No judgment for deficiency can, therefore, be given against them in favor of Frank.

Appellant's Points.

JOHN W. HESSE, PLAINTIFF AND APPELLANT, v.
SAMUEL ELLIS BRIGGS, DEFENDANT AND RE-
SPONDENT.

I. PARTY RESIDENT OF THE STATE, EXAMINATION OF BEFORE TRIAL.

1. *Where it must be had.*

(a) In the county where the party either resides or has an office for the regular transaction of business in person.

(b) SUPERIOR COURT, EFFECT OF ACTION BEING PENDING THERE.

1. Notwithstanding this, a party resident of the State, but who neither resides nor has an office, &c., in the county of New York, cannot be compelled to submit to an examination in that county.

1. This although he is party plaintiff.

II. COSTS OF APPEAL FROM ORDER.

1. *When not awarded.*

(a) Where the point involved is one of practice, and is a new question presented for the first time.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal by plaintiff from an order denying a motion to vacate an order for the examination of the plaintiff before trial, and directing the plaintiff to appear and be examined, and that his deposition be taken pursuant to section 873 of the Code of Civil Procedure, before one of the justices of this court at chambers in the city of New York.

M. R. Lawrence, attorney, and of counsel, for appellant, urged:—I. The right of a party to examine an adverse party as a witness before trial, and the power of the court to order such examination, depend entirely upon the statute (*Code Civ. Pro.* § 870), aside from which no such right exists, and the court has no power to make such an order

Appellant's Points.

II. Under the former Code of Procedure, an examination of an adverse party could be had either in the county in which the party whose examination was desired resided, or in any county in which he was served with a summons for his attendance (*Code of Pro.* § 391). The rule thus created by section 391 of the Code of Procedure was productive of many hardships, which came frequently to the notice of the courts, and in the case of *Todd v. Hambden* (41 *How. Pr.* 230), the court suggested an amendment which would obviate the difficulties thus created. The existing law upon the subject of the place where the examination may be had, is section 886 of the Code of Civil Procedure, which was designedly so framed as to repeal the provision permitting the examination in any county in which the party might be served with the process. That such was the object of the revisers is clear from the note of Mr. Throop to section 886 of the Code of Civil Procedure (See *Throop's Code of 1877*). The object in question has been clearly accomplished by the enactment of the section last named, which is in clear and definite language, of unmistakable meaning. Section 886 of the existing Code of Civil Procedure is clearly designed to prevent residents of the State from being obliged to attend for examination in any county other than that in which they reside or have a regular office for the transaction of business, in person (See *Code Civ. Pro.* § 886). In a recent case, determined by the general term of the supreme court in this department, it was held that a party cannot be compelled to attend for examination as a witness before the trial, except in the county where he resides, or has a place of business (*Marsh v. Woolsey*, 6 *Weekly Dig.* 532). The power, both of the supreme court and of this court, with reference to this subject, is derived from and limited by the same sections of the same statute (*Code Civ. Pro.* §§ 870-886). There is no pos-

Respondent's Points.

sible distinction between the powers of the two courts on this subject. If the legislature has made it impossible to examine before trial, in an action in this court, an adverse party, who neither resides nor carries on business in the city of New York, the court cannot supply the omission. There being no power conferred upon the court by any statute whereby it can compel the attendance of a non-resident party, in such a case as the present, and the fact of the plaintiff's non-residence appearing from the papers on which the order for examination was applied for, the order should not have been granted, and, when granted, should have been set aside upon the plaintiff's motion. The facts appearing from the papers originally presented, the order was without jurisdiction, and consequently void.

George C. Lay, attorney, and of counsel, for respondent, urged:—I. Section 886 of the new Code was not intended to apply and does not apply to the superior city courts. This section was enacted to correct an abuse and prevent annoyance. The appellant would so construe it as to deny the respondent an important right granted by the old Code and re-affirmed by the Code of Civil Procedure, viz.: The right to examine an adverse party before trial. The effect of a strict and technical construction of this section is to deprive the superior court of jurisdiction to examine a plaintiff before trial in the city of New York, because he lives in an adjoining county, and has no place of business in New York, although he has chosen this jurisdiction in which to bring his action, and comes to New York daily. (a) It is a rule in the construction of statutes that wherever the statute works a change in the existing law, it is necessary to take into account the old law, the evil which the statute makers intended to rectify, and the remedy they have provided. The effect of this rule is to confine the remedy to the evil or mischief to

Respondent's Points.

be rectified, even though the words on their face have a broader meaning. Under the old Code a party residing in a far distant county might be compelled to attend before a judge in New York because served with a summons for his attendance, while temporarily in this city. This power was often abused by litigators and was productive of many hardships. The section in question was passed to correct these abuses. (7) Section 886 by its terms allows the examination of a non-resident of the State in any county of the State where he may be served with a subpoena. It appears from this provision that the legislature did not intend to deprive a party of his right to examine his adversary in any case, but only to avoid making the examination an oppressive and annoying proceeding.

II. The section of the statute under which the appellant claims immunity from examination, is a remedial statute, and should be liberally construed. By a strict construction of the language used, the intention of the legislature is violated, while by confining the operation of the rule to cases which it was clearly enacted to meet, no violence is done to reason or justice. There is abundant authority for disregarding the plain words of a statute when they manifestly conflict with the intention of the law makers, otherwise clearly expressed. There are several maxims which seem to apply—" *boni judicis est ampliare jurisdictionem*," applied in Broom's Maxims to construction of statutes (*Broom Leg. Max.* 82). "Reason is the soul of the law. *Cessante ratione legis, cessat ipsa lex*." The intention of the legislature is to be gathered from other acts in *pari materia*, as well as from the act itself. Sometimes it is to be collected from the cause or necessity of the statute, and sometimes from other circumstances; and wherever it can be discovered, it ought to be followed with reason and discretion in the construction, although such construction

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seems contrary to the letter of the statute. A thing within the intention is within the statute, though not within the letter, and a thing within the letter is not within the statute unless within the intention; such construction ought to be put upon it as will not suffer it to be eluded (*Bac. Abridg.* tit. "Statutes," 1, 5, 10; *People v. Utica Ins. Co.*, 15 *Johns.* 358; *Jackson v. Collins*, 3 *Cow.* 89).

III. According to the practice of the superior court governing non-residents of the county, the plaintiff stands in the same position as a non-resident of the State. As a non-resident of the county he has been compelled to file security for costs in this case. So far as this court is concerned, the plaintiff stands on the same footing as a non-resident of the State. The language of section 886 is simply, "Where he is not a resident he shall not be required to attend in any other county than that wherein he is served with a subpoena, &c." The plaintiff, a non-resident, voluntarily submits himself to this jurisdiction, and comes to New York daily, and was served with the order in this city. He would construe the statute to defy the order of the court, and claims entire immunity from examination in a case where justice demands it.

BY THE COURT.—CURTIS, Ch. J.—It appears that at the time of the commencement of the action, and at all times thereafter, the plaintiff did not reside in the city and county of New York, but in the county of Kings, nor did he have any place for the transaction of business in the city and county of New York.

The right to examine the plaintiff as a witness before trial, and the power of the court to order such examination, depends entirely upon the provisions of sections 870 to 876, inclusive, of the Code of Civil Procedure. The latter section is as follows: "Where a person to be examined as prescribed in this

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article is a resident of the State, he shall not be required to attend in any county other than that in which he resides, or where he has an office for the regular transaction of business in person. Where he is not a resident, he shall not be required to attend in any other county than that wherein he is served with a subpoena, unless, for special reasons stated in the affidavit, the order otherwise directs."

The words "where he is not a resident," in this latter section, when read in connection with the preceding sentence, show that it is a non-resident of the State that is referred to, and not a non-resident of the county. This reading is alone consistent with the language of the preceding sentence, and with the two restrictions therein contained. It is, besides, but reasonable to consider that the legislature, if it had intended to place the superior city courts upon a different basis from the supreme court in relation to this remedy, would have distinctly expressed it.

The question arises for the first time before the court, and hardly calls for the awarding of costs to either party.

The order appealed from should be reversed, without costs, and the order for plaintiff's examination vacated, without costs.

FREEDMAN, J., concurred.

Appellant's Points.

MARY A. JORDAN, AS ADMINISTRATRIX, &C.,
PLAINTIFF AND APPELLANT, v. THE NATIONAL
SHOE AND LEATHER BANK, &C., IMPEADED,
&C., DEFENDANT AND RESPONDENT.

Plaintiff's attorney also an appellant.

I. *Costs.*

1. ATTORNEY, WHEN IMPOSED ON PERSONALLY.

(a) NON-WITHDRAWAL OF MOTION IN SEASON.

1. Where a motion has been properly noticed by plaintiff's attorney, but prior to its hearing plaintiff's costs are taxed, judgment is entered and paid, and a satisfaction piece given, by reason whereof the motion cannot be maintained, and it does not appear that plaintiff, after the payment of the judgment, directed the attorney to proceed with the motion, the non-withdrawal of the motion by the attorney upon the payment and satisfaction of the judgment, is cause for imposing on him personally, in the discretion of the court, the costs of opposing the motion.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal by plaintiff from an order denying a motion for an extra allowance, made on behalf of plaintiff, with \$10 costs of motion, to be paid by the plaintiff's attorney personally, and by plaintiff's attorney, from so much of the order as charged him personally with costs.

The facts appear in the opinion.

Wellesley N. Gage, attorney, and *S. D. Seward*, of counsel, for appellants, urged:—I. At common law, an attorney is held answerable to the summary jurisdiction of the court for every act of official misconduct (2 *Greenl. Ev.* § 147). An attorney can only be required

Appellant's Points.

to pay costs incurred by fraud or gross negligence. In the case at bar there was no fraud nor negligence, and none was charged.

II. The plaintiff had a right to enter judgment without notice, and to demand payment thereof of the defendant instead of issuing execution, if she preferred to do so, and she was not obliged to give personal notice to defendant's attorney. The plaintiff's proceedings in entering judgment were in all respects regular (*Code*, § 1,228, Amendment of 1879). Whatever the plaintiff or her attorney did was a relief and benefit to the defendant, it obviated the hearing of the motion for an extra allowance on the merits, which allowance, had plaintiff not proceeded as she did, would, doubtlessly, have been granted. The defendant, by reason of the plaintiff's acts, was saved the expense of the sheriff's fees on execution; hence, all that the plaintiff did after making the motion inured to the benefit of the defendant. There are no grounds upon which the court is justified in imposing a fine upon the plaintiff's attorney, and no act of the plaintiff or her attorney did, or was calculated to injure or prejudice the rights of the defendant, in the remotest degree.

III. The plaintiff, on the adjourned day, was regular in stating to the court, through her attorney, what had been done, and to ask leave of the court to withdraw her motion. And under the circumstances it would seem she should be allowed to do so without terms. It has not been the practice, where a motion for an extra allowance has been made, to deny or grant the same with costs, and in *Schwartz v. Poughkeepsie Mutual Fire Ins. Co.* (10 *How. Pr.* 93), *BROWN, J.*, said, "costs of such motions have not, and should not, be allowed" (See, also, *Dickson v. McElwain*, 7 *How. Pr.* 139, 140). No previous notice of the plaintiff's intention to withdraw the motion was necessary, and

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would have been of no avail. The application must be made to the court when the motion is called.

IV. A party has a right to discontinue an action, and has the same right respecting a motion; the motion, therefore, should not be denied on the merits.

V. An attorney cannot be subjected to fine or imprisonment, except for some misconduct as such (*Code*, §§ 14, 15). The case at bar does not present facts for which an attorney should be subjected to fine or imprisonment. The plaintiff, to prevent further delay in the entry and collection of the judgment, which, in any event, must be an injury to the estate she represents, chose to waive her right to an extra allowance rather than incur the risk and expense attendant upon such delay. This was her privilege, and, under the circumstances of this case, her obvious duty. The attorney should not be fined for following his client's instructions, in protecting his legal rights in a lawful manner. The order appealed from states no ground for imposing the fine on plaintiff's attorney (*Matter of Kelly*, 59 *N. Y.* 595; 62 *Id.* 198).

Henry N. Beach, attorney, and of counsel, for respondent, submitted no points.

BY THE COURT.—CURTIS, Ch. J.—This motion came on to be heard August 27, 1879; it was brought on by an order to show cause, granted August 22, 1879, returnable at one o'clock of that day, when, after stating the nature of the motion and that it was for an extra allowance, it was adjourned by the court, on application of the defendant's counsel, to August 27. Upon the last named day, it appearing that pending the adjournment the plaintiff had entered judgment, which had since been paid, the defendant's counsel moved that the motion be denied, with costs against the plaintiff's attorney personally, which was granted.

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In the statement of facts upon the appellant's points it is mentioned that the plaintiff's attorney, on August 27, asked leave of the court to withdraw the motion, but I fail to see that in the papers. The affidavit of the defendant's attorney, which is not contradicted, alleges as follows :

"That on the said 22d day of August inst., the plaintiff's attorney taxed the costs of this action immediately after the said adjournment of said motion. That the said plaintiff's attorney, the same day, without notice to deponent, entered judgment in favor of the plaintiff against the said bank, for debt and costs as taxed. That deponent is informed and believes, that said attorney for plaintiff, without notice to deponent, and without his knowledge of the entry of said judgment, took a transcript thereof to the president of said bank and demanded payment thereof; and by way of excusing his unprofessional conduct, represented that by its immediate payment to him the bank would save the sheriff's fees, and thereby induced the said president, without any opportunity of consulting deponent, as counsel for said bank, to refer the matter to the cashier, with instructions to pay said judgment.

"That said cashier sent for deponent to consult him on the subject on the following day, the 23d inst., at the office of said bank, where he found the plaintiff's attorney in waiting for payment of said judgment, and after examining the satisfaction piece, which was defectively acknowledged, the same having been re-acknowledged according to law, the said judgment was paid and satisfaction thereof delivered to said cashier of the bank, and the same has been discharged of record."

It thus appears, that the defendants, after the final costs were adjusted, and after the payment of the judgment in full, and after the execution of the satisfaction piece, were compelled, without any counter.

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mand or withdrawal, to attend to oppose the motion for an allowance on August 27. This motion being in conflict with Rule 47 of the rules of the courts and the settled practice of the courts, could not be entertained, and was denied, with costs and disbursements to be paid by the plaintiff's attorney personally.

The plaintiff herself, having been previously paid the judgment, and having executed a satisfaction piece, had no just right to direct the attorney who had represented her to bring on this motion for an allowance, and to argue it. Nor does it appear from the papers that she was then cognizant of such act, or authorized it. It was proper that provision should be made in the order for the payment of the defendant's costs of attending and opposing the motion. The circumstances were such that even if there had been any liability on the part of the plaintiff to pay the costs, it was a proper exercise of the discretion of the court to direct their payment by the attorney. As the plaintiff's relations to the litigation had ceased with the recovery and payment of the judgment and its satisfaction, there was nothing before the court on the present papers that disclosed any reason why she should pay, or be ordered to pay these costs, or that called for such an order. The person who, subsequently to the satisfaction of the judgment, claimed to act, or acted, as the plaintiff's attorney, and brought on the motion, should, as between the two, more properly be called on to pay the costs of opposing, especially as he saw fit after this satisfaction and extinguishment of the judgment, to present such an application to the court.

The order appealed from should be affirmed, with costs.

FREEDMAN, J., concurred.

Statement of the Case.

FREDERICK BANFIELD, PLAINTIFF AND APPELLANT, v. ANNIE C. HAEGER, DEFENDANT AND RESPONDENT.

I. Pleadings.

1. CLAIM AND DELIVERY.—FORM OF COMPLAINT HELD TO PRESENT AN ACTION FOR.

(a) A complaint alleged that plaintiff is the owner of, and entitled to the immediate possession of certain property of a specified value ; that defendant became possessed thereof wrongfully, and plaintiff demanded the delivery thereof to him, which was refused, and defendant converted the same to her own use; and prayed the delivery of the property, with a specified amount for damages for its detention.

Held,

to present an action for claim and delivery.

2. CONSTRUCTION OF COMPLAINT, AS DETERMINING WHAT ACTION IS PRESENTED THEREBY.

(a) *Unnecessary allegations disregarded.*

1. Allegations *unnecessary* to entitle plaintiff to the relief he asks may be disregarded as superfluous.

II. Warehouseman.—Bailee.

1. RIGHT OF, TO DEMAND INDEMNITY, WHEN NOT ENTITLED TO SO DEMAND.

(a) He has no right to demand of a mortgagee (not his bailee), who finds the mortgaged goods in his possession, an indemnity against an adverse claim as a condition of delivery.

2. CONFLICTING CLAIMS; REMEDY OF WAREHOUSEMAN.

(a) To commence a suit in the nature of an interpleader.

III. Mortgages of chattels.

1. Right to delivery of mortgaged goods held by warehousemen (not his bailee), without indemnity.

See Warehouseman, *supra*.

IV. Interpleader.

1. Warehouseman entitled to maintain.

See *supra*.

V. Claim and delivery.

1. DISMISSAL OF COMPLAINT; WHAT NOT CAUSE FOR.

(a) Neglect to prove *value of goods and damages*, is not, it appearing that plaintiff is entitled to a return of the goods.

Appellant's Points.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1878.

Appeal by plaintiff from an order dismissing the complaint and judgment thereon.

The plaintiff, in his complaint, alleges that he is the owner, and entitled to the immediate possession of certain furniture therein described, of the value of \$700; that the defendant became possessed of said property wrongfully, and the plaintiff duly demanded the delivery of said property to him, which was refused, and the defendant converted the same to her own use; wherefore the plaintiff demands the delivery of said property, with \$200 damages for its detention, besides the costs of this action.

The answer denies the allegations of the complaint, and alleges that the furniture was, before the commencement of the suit, duly levied upon by the sheriff, and taken from defendant's possession by virtue of due legal process, of which the plaintiff was notified by the defendant, and was able to have protected his rights and title, if any he had, in the furniture. The complaint was dismissed at the trial. The plaintiff duly excepted, and appealed from the order and the judgment of dismissal.

Stephen B. Bague, attorney, and of counsel, for appellant, urged, among other things:—This is an action of claim and delivery. The learned judge below is too refined in his distinction, in holding that the word "wrongfully" converts this action into an action for trespass. There is no such distinction in the books. Now the fact is, that the defendant did come into possession of the goods wrongfully. No matter how innocently a person may come into the possession of property, the law decides that it is wrongful if

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derived from a thief, or from a person having no show of title, and no demand before suit is necessary (*Farrington v. Payne*, 15 *Johns.* 431 ; *Pillsbury v. Webb*, 33 *Barb.* 213 ; *Pease v. Smith*, 61 *N. Y.* 213). Here the property was in the possession of the plaintiff when it was run off, removed, carried away contrary to the statute (*Laws of 1871*, c. 77), in fact, stolen, for the statute only relates to the time before foreclosure; after default and taking possession of property, the surreptitious removal is a larceny, and any person converting it is liable in trover (*Hoffman v. Carow*, 22 *Wend.* 285, and cases above cited). Again, there was no defense to the action except the general denial. The case was proved on showing title, demand and refusal, and the answer setting up title in another was irrelevant; for it is no defense to an action to recover property converted to allege title in another, unless the defendant connects himself with the title (*Duncan v. Spear*, 11 *Wend.* 54 ; *Rogers v. Arnold*, 12 *Id.* 30 ; *Stowell v. Otis*, 71 *N. Y.* 36).

Platt, Gerard & Bowers, attorneys, and *John M. Bowers*, of counsel, for respondent, urged :—I. The complaint is for an unlawful taking by the defendant; the proof was of a lawful reception by the defendant, and, at most, of a refusal to deliver only on conditions necessary to the defendant's protection. The cause of action was, therefore, wholly unsustained by proof. The court was quite right in dismissing the complaint; it could not have done otherwise. The plaintiff insisted on his right to a ruling in his favor, and refused to amend or to ask the privilege of doing so.

II. The complaint demands judgment that the property be returned, and for \$200 damages for its detention. A return of the property could not be had in this action. Plaintiff should have brought replevin if he desired such remedy. No proof of damages, by

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reason of the alleged detention, was offered, and the court was obliged to dismiss the complaint.

III. No refusal to deliver, on which an action for conversion could be maintained, was proved. Defendant at first acquiesced in the plaintiff's claim, but on finding that the plaintiff's claim to the possession of the property was seriously disputed, asked indemnity. The course the defendant pursued was the only safe one for a warehouse-keeper, and is sustained by *Ball v. Liney* (48 *N. Y.* 6).

IV. The mere possession and exhibition of a chattel mortgage, covering the property stored with the defendants, with no evidence that it had become enforceable, was not such proof of ownership and of the plaintiff's right to take possession as to justify an action for conversion for refusal to deliver. The mere existence of the mortgage by no means changed the possession or right to the possession of the property, and it was certainly not enforceable against the defendant without some evidence of breach of its terms (*Bliven v. Hudson River R. R. Co.*, 36 *N. Y.* 405).

V. The equities of this case are all with the defendant. She innocently received the goods; when the agent of the plaintiff called with his mortgage, although he showed no breach of its terms, she permitted him to roam through the building in search of the goods, saying, if the mortgage was all right it should not be resisted; and even when she found his title to the property was in litigation, still offered to give it up on being indemnified, but plaintiff refused all and any indemnity. The defendant did only what any prudent person would have done, and is entitled to the protection of the court; and as a very stringent provision of the law has been sought to be enforced against her, no variation of a pleading should be permitted to help the plaintiff to a new trial.

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BY THE COURT.—CURTIS, Ch. J.—The trial of this action appears to have been conducted on the theory that it was an action of trespass. The complaint alleges that the defendant became wrongfully possessed of the property in question, and also alleges that she wrongfully converted it to her own use. The prayer for relief demands the delivery of the property and damages for its detention. The language used in the complaint may be construed as meaning that the defendant wrongfully took and unjustly detains the goods. This was the form, before the Code, of a declaration in the *cepit et detinet*. The provisions of the Revised Statutes, as to what the declaration shall allege in replevin (2 R. S. 523, § 36) have been to a considerable extent superseded by the provisions of the Code, respecting what is there designated as “claim and delivery of personal property.” The Code does not change the requisites to maintain the action (*Scofield v. Whitelegge*, 49 N. Y. 260). The proceedings in the present action appear, though not very clearly, to present the requisites to maintain it as an action to recover the possession of personal property. The allegation in the complaint, of the conversion of the property to the defendant’s own use, is consistent with a complaint in an action of trover, and the allegation of wrong on the part of the defendant in respect to acquiring possession of the property, was construed at the trial as an allegation of a tort in the nature of trespass. The requisites to maintain the proceedings in “claim and delivery” are too distinctly defined to warrant a complaint presenting a triple aspect, and that may be available in replevin, trespass or trover, as the exigencies of future proceedings in the action may render desirable. But if parties elect to proceed to trial in a suit, where the complaint is so indefinite or uncertain that the precise nature of the charge is not apparent, the embarrassments occurring in the present

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instance are very likely to arise. The demand, for the delivery of the property and of damages for its detention, in the complaint, indicate that the pleader had in view an action under the Code for "the claim and delivery of personal property." That it is such is the only view I have been able to arrive at (*Dows v. Green*, 3 *How. Pr.* 377; *Spalding v. Spalding*, *Id.* 297; *Scofield v. Whitelegge*, 49 *N. Y.* 259).

Whatever facts are stated in the complaint, which were unnecessary to entitle plaintiff to the relief he asks, may be disregarded as superfluous.

The plaintiff appears to have been rightfully entitled to the possession of this property. The evidence discloses that it was removed from his possession while he was proceeding to foreclose a chattel mortgage in his favor that existed upon it, and that this was done surreptitiously and wrongfully; that he demanded it of the defendant, in whose possession it was, as a warehouse-keeper, and that she refused to surrender it, unless a real estate bond of indemnity to the extent of \$1,500 was given to her. I am not aware of the existence of any legal requirement that a mortgagee, finding the mortgaged property to which he has a right of possession placed surreptitiously in a warehouse, is bound to give the warehouse-keeper a bond of indemnity, nor do I understand the cases cited by the defendant's counsel (*Ball v. Liney*, 48 *N. Y.* 6; *Bliven v. Hudson River R. R. Co.*, 36 *Id.* 405) to go so far as to sustain that view.

If there are conflicting claimants the course to be pursued is to immediately commence a suit in equity in the nature of a bill of interpleader against the claimants, and have the controversy, and the right to the possession of the property, judicially determined (*Ball v. Liney*, 48 *N. Y.* 13).

The conclusions arrived at in regard to the pleadings, and the relief and nature of the action, consider-

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ing it not as an action of trespass, but simply an action of replevin, are, as it seems to me, in accord with the views of the learned trial judge, while sitting as a referee in the replevin suit of *Levin v. Russell* (42 *N. Y.* 253) and affirmed by the supreme court at general term, and by the court of appeals, and approved in *Scofield v. Whitelegge* (49 *N. Y.* 259).

The plaintiff had shown upon the trial of the action that he was at least entitled to the possession, or to be restored to the possession, of the mortgaged chattels (*Levin v. Russell*, 42 *N. Y.* 251).

Any failure of proof on the part of the plaintiff as to damages sustained by the detention, or as to the value of the goods, does not appear to have been among the reasons for the dismissal of the complaint, nor would the dismissal on such grounds have been tenable.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

FREEDMAN, J., concurred.

ARTHUR B. LONG, ET AL., PLAINTIFFS AND RESPONDENTS, v. EDWARD BUSSELL, IMPLEADED, &C., DEFENDANT AND APPELLANT.

MONEY HAD AND RECEIVED—ACTION FOR THE SAME.

"As a general rule, the question is, to which party *ex aquo et bono* does the money belong" (*Buel v. Boughton*, 2 *Den.* 91).

This action "is denominated an equitable action, and is less restricted by technical rules than most others. It aims at the mere justice of the case, and looks entirely to the question whether the defendants hold money, which in equity and good conscience belongs to the plaintiff (*Colville v. Besley*, 2 *Den.* 139, 142).

Held, in this case, that the defendant received money which in equity and good conscience belonged to the plaintiffs. They

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came into its possession by a misappropriation of it by plaintiff's factors and agents. The latter, as between themselves and their principals, had no right to, nor interest in, such moneys, except as the trustees of the plaintiffs. The defendants did not part with any consideration, nor incur any liability; nor did they release any right or property, for or on account of its payment to them.

The case of *Butterworth v. Gould* (41 N. Y. 450) reviewed, and not considered analogous to this case.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal by defendant from a judgment in favor of the plaintiffs, entered upon the report of referee.

The facts sufficiently appear in the opinion.

S. R. Johnson, for appellant.

Ed. W. Chamberlain and *Nelson Smith*, for respondents.

BY THE COURT.—CURTIS, Ch. J.—The referee found, that on or about March 19, 1877, the plaintiff, by Valentine Meyers & Co., their factors, at the city of New York, sold and delivered to the copartnership firm of Southard & Co., doing business in the city of New York, a quantity of pine lumber belonging to the plaintiffs, consisting of one hundred and five thousand seven hundred and forty-three feet, at the price of \$16 per thousand feet, amounting to \$1,624.43, over and above the freight thereon, which freight was also to be and was paid by Southard & Co., to the party entitled thereto, and which sum of \$1,624.43 became due and payable from Southard & Co. to the plaintiffs, for the price of the lumber, on or about March 22, 1877.

That also, on or about March 22, 1877, the firm of Southard & Co. paid over to the defendant the price of

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the lumber so due to the plaintiffs, being the sum of \$1,624.43, and the same was received by the defendants to the use of the plaintiffs.

The referee also found that plaintiffs, on or about January 28, 1878, demanded the sum from the defendants, which they neglected and refused to pay, and that the same, with interest from January 28, 1878, was justly due and owing from the defendants to the plaintiffs.

The referee also found, as conclusions of law upon the facts of this case, that the plaintiffs were entitled to recover from the defendants in this action the sum of \$1,745.34, together with the plaintiffs' costs of the action, for which judgment should be entered against both of the defendants, so far only as that it may be enforced against the joint property of both defendants, and the separate property of Edward Bussell.

The proofs sustain the findings of fact of the referee. The conclusions of law that he arrives at are well and carefully considered in his opinion, which is as follows:

The plaintiffs reside at Grand Rapids, Michigan, and manufacture lumber.

Valentine, Myers & Co., at the time of the transactions in question, were engaged in selling lumber on commission, and in the purchase and sale of it on their own account, and had their lumber depot at Hastings, in this State, and an office in the city of New York.

Some time in 1876 there was an agreement made between them and the plaintiffs, by which the latter were to forward to the former, at Hastings, in this State, lumber to be sold by Valentine, Myers & Co., as the factors and agents of the plaintiffs. Valentine, Myers & Co. were to advance all the money required to pay the freight on the lumber thus forwarded to them, and after the latter had sold the lumber they were to make returns on the sale to the plaintiffs. Valentine,

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Myers & Co. were to deduct from the gross proceeds of the sales five per cent. on the amount thereof for their commissions, the amounts advanced by them for freight, and the amount of charges that would accrue, the nature of which charges was understood between them.

Under this arrangement, Valentine, Myers & Co. from time to time received lumber from the plaintiffs, and out of the lumber thus received they sold and delivered to Southard & Co., of this city, on or about March 19, 1877, a lot of lumber, amounting to \$1,691.88, or thereabouts. At the time of this sale Valentine, Myers & Co. were indebted to the plaintiffs on account of sales made by them prior thereto of the plaintiffs' lumber, over and above the amount of all sums which they had paid for freight on all the lumber forwarded to them by the plaintiffs, and over and above all charges they could possibly make in regard thereto, in an amount exceeding the sum of \$6,000, and which yet remains unpaid. On March 20, 1877, Valentine, Myers & Co. assigned to the defendants their claim and demand against Southard & Co. for the price of the lot of lumber they sold to the latter, which assignment is in writing, and concludes thus, viz. :

"The consideration for this assignment being so much of the indebtedness due by us to said Bussell & Co. as shall be equivalent to the amount of the claim assigned."

On this assignment Southard & Co., soon after its date, paid to Bussell & Co. \$1,500 in money, and paid by direction of Valentine, Myers & Co. to the captain of the boat on which this lumber was brought from Hastings to this city, \$67.41, the amount due him for freight, and adjusted the balance, being \$124.43, by crediting the same to the defendants on account, whereby they have received the same in a way equiva-

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lent to the receipt of the same in cash. At the time Valentine, Myers & Co. assigned this claim to the defendants they knew that Mr. Havens, one of the firm of Valentine, Myers & Co., was about to commence a suit against his copartners to wind up the business of the firm and obtain the appointment of a receiver of its property and effects. Such a suit was soon brought, and a receiver therein was appointed, and Mr. Bussell was one of the sureties of the receiver in that suit, or was a surety for Havens to enable him to obtain an injunction therein. Southard & Co. had no notice, when they bought this lumber and paid for it, as above stated, that the plaintiffs were in any way interested in such lumber; nor did the defendants have any such notice when they received the said assignment, nor at the time they received from Southard & Co. the \$1,500 in cash, or at the time they took payment of the \$124.43 by receiving a credit for it on account.

It is clear that the lumber sold by Valentine, Myers & Co. to Southard & Co. belonged to the plaintiffs at the time of the sale and delivery thereof. That as between the plaintiffs and Valentine, Myers & Co., the latter had no right, legal or equitable, to any part of the price to be paid for it. The money paid for it by Southard & Co. to the defendants, when thus paid, in equity belonged to the plaintiffs. Their lumber, by the sale made of it, and the payment made therefor, became converted into this money, which they thus identify and follow into the defendant's possession. In judgment of law, as I think, they received it to the plaintiffs' use, unless the facts proved establish a right in them, to take and retain it as against the plaintiffs. The defendants now seek to retain it on the ground, in substance, that on March 16, 1877, they loaned Valentine, Myers & Co. \$1,500 in money, on the promise that the proceeds or price of the lumber which Southard &

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Co. bought should be applied to repay this loan of \$1,500. There are three items of evidence bearing directly on this question, viz. :

1. The terms of the assignment of the claim.
2. The testimony of Bussell, and
3. The testimony of Mr. Havens, who got the loan from Bussell.

First. The terms of the written assignment do not import that it was made to secure specially this loan. The loan was \$1,500, and the demand, as proved, was \$1,624.43, as Southard & Co. paid to the captain of the canal boat \$67.45, which left due on the lumber \$1,624.43. The assignment states that the claim assigned was "supposed to amount to about \$1,600, more or less." It directs "Southard & Co. to pay the said claim to said E. Bussell & Co., or to settle with them for the same," and declares the consideration thereof to be "so *much* of the indebtedness due by us" (Valentine, Myers & Co.) "to the said Bussell & Co., as *shall be equivalent* to the *amount* of the claim assigned." This imports the precise consideration and cause of the assignment of the claim to be pre-existing indebtedness of Valentine, Myers & Co. to E. Bussell & Co., of the same amount as that of the claim assigned, and that such pre-existing indebtedness exceeded in amount the amount of the claim assigned. There is nothing in it pointing to or indicating any loan of \$1,500, and certainly nothing suggesting the idea of such a loan having been made on a promise that it should be repaid by means of payment of this claim, but, on the contrary, its terms are repugnant to any such idea, or the existence of any such fact.

Second. E. Bussell was examined, before trial, on March 21, 1878. Previously thereto, and about January 28, 1878, he had received written notice from the plaintiffs of the claim which they seek to enforce in this action. On that examination he testified thus, viz. :

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"The last loan I made them (viz., Valentine, Myers & Co.) was on March 16, 1877, \$1,500; I fix the date by the fact that I gave a check, and have recently looked up the check" . . . "and this said last loan was only for a day; I took no note or other security" . . . "This last loan of \$1,500 was agreed to be repaid the next day, the 17th; I did not see them on the 17th, to the best of my recollection, but did see them within a few days after; think it was at their office, and called their attention to the fact that they did not return said loan; they then said that they had been disappointed in getting money from some bank; think it was some notes they offered for discount; they had some lumber here which was about sold, or that they calculated to place, they said; they gave me a writing on Southard & Co." (meaning thereby the assignment before mentioned). . . "I got \$1,500 within a day or two; I do not remember when I got the rest. . . They gave me \$1,500 in money, and credit for the balance."

"Q. On what account did you take that paper from Havens?" (meaning the assignment).

"A. It was on account of the indebtedness I had against Valentine, Myers & Co., and I gave no receipt for it."

On the trial of this action Bussell was again examined, and, after hearing his previous deposition read, and after hearing Jonathan N. Havens testify in relation to the loan of the \$1,500, testified thus, viz.:

"Q. You remember this check of March 16, 1877, which has been referred to?"

"A. Yes."

"Q. What took place between you and Mr. Havens, if anything, in regard to this lumber which was sold to Southard & Co. at the time of giving this check?"

"A. He came to me and wanted to borrow \$1,500 for a day or two; he said that he had money coming in from some bank, and also a boat load of lumber at

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Watrous & Wilson's yard, which he had sold, and which he would probably have the money for next day, and would reimburse that money if I would lend him the \$1,500; I did so, and did not hear anything of him in a day or two; I went to see them, and they explained that Watrous & Wilson had only taken part of the load, or that they were about selling it somewhere else; that their money had not come from the bank, and that as soon as it was sold they would give me my money; in the course of a day or so they sold this lumber to Southard & Co., and gave me an order, as I supposed it was, to go and collect the money."

On cross-examination he testified thus :

"Q. This balance here, over and above the \$1,500 with which you were credited by Southard & Co., I suppose, has been paid to you; that is, you had dealings with Southard & Co., hadn't you?

"A. Yes.

"Q. And that balance was allowed to you as against claims that they held against you?

"A. Yes, sir.

"Q. So that it is the same as cash in your hands?

"A. Yes."

I think it perfectly clear on this testimony that the loan of \$1,500 was not made in reliance on any promise by Havens that the proceeds of this cargo of lumber should be applied to repay it. That Bussell had no such idea when he made the loan, and, according to his deposition before trial, there could be no pretense that anything was said about this cargo of lumber at the time the loan was made. As Bussell details the transaction in that deposition, the cargo of lumber was spoken of when he went and inquired why the loan had not been repaid. There is no pretense in that deposition that any allusion was made to it, or to any explanation of Havens getting money from a bank at the time the loan was made. The testimony of Bussell

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harmonizes with the terms of the assignment, in respect to what the transaction in regard to this loan was.

The testimony of Havens does not convince me that the terms of the assignment fail to describe that transaction truly in its whole substance, or that Bussell has failed to describe it accurately. A part of his testimony tends to show that when he borrowed the \$1,500, he assured Bussell that he would give him a claim on the lumber, and as soon as the money was got for it he should have it. But, he says, he don't think he said to Bussell, at the time of the loan, that he was expecting to get money from a bank, or that he had offered some notes for discount, and expected to get the money in that way.

Is positive he told Mr. Bussell when he got this check that he would pay when he sold that lumber that was on the boat *T. C. Davis*.

"Q. Did Mr. Bussell, at the time you gave him this assignment, on 20th March, know that your firm had suspended or were about to suspend? . . .

"A. . . . It was well understood that we gave him this assignment, because we would have to suspend; it was given to him, and, I think, he understood it was for that purpose; we wanted to secure him.

"I told him it would be better to secure this \$1,500 by making an assignment of the claim for this boat load of lumber; the boat load of lumber was sold." This was after the sale to Southard & Co., as that was not made until the 19th.

There are some undisputed facts that support the theory that when Bussell made the loan of \$1,500 nothing more was said by Havens than that he would repay it the next day, or in a day or two. At that time Bussell did not suspect that the firm of Valentine, Myers & Co. were in difficulty. That firm and Bussell & Co., prior thereto, from time to time, exchanged notes, and at that time there were outstanding notes of

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this character, amounting to several thousand dollars (about \$6,000), and Bussell did not consider that Valentine, Myers & Co. then owed Bussell & Co. anything, because the latter then supposed the notes of the former perfectly good. There was not, therefore, any apparent necessity or occasion for Havens to promise, or even suggest, in order to obtain this loan for a day or two, that he would devote any designated property to repay the loan.

On such a state of facts it was natural, and according to the usual course of business under the circumstances, that the transaction should have been such as Bussell in his deposition testifies it was.

But before the assignment was made the affairs of the firm of Valentine, Myers & Co. had reached such a crisis that Havens, as a member of that firm, had determined to bring a suit against his partners and obtain the appointment of a receiver, and did do so. That Bussell then knew. That made it certain that Bussell & Co. would be obliged to pay their outstanding notes which they had given for notes of Bussell & Co. to a like amount, and that the notes of the latter would be protested, and that Bussell & Co. would, at most, only receive a dividend on the notes they had given, and would be compelled to pay. The testimony indicates that indebtedness of Valentine, Myers & Co. to Bussell & Co. to thus accrue, or to thus become absolute, was, in the contemplation of the parties to the assignment, part of the indebtedness therein mentioned.

These considerations naturally aid, in coming to the conclusion that Bussell, in his deposition, stated the transaction truly, and the whole of it, and that Havens is mistaken in supposing that what was first told by him to Bussell, about the lumber finally sold to Southard & Co., was said before the check was delivered, and that it was in fact said a day or two after that, when Bussell called to inquire why the loan had not been re-

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paid. It was more important to Bussell and his firm what the fact was in this regard than it was to Havens, and he, of the two, would naturally remember the transaction according to its substance, if either would. His memory, in regard to that point, would be expected to be more fresh and reliable when first examined than it would be some months later.

I cannot resist the conclusion that the \$1,500 was loaned entirely without security, and without any promise to repay it out of the proceeds of a sale of the lumber sold to Southard & Co.

On such facts the defendants received from Southard & Co. money belonging to the plaintiffs, without paying any consideration therefor.

In an action for money had and received, "As a general rule, the question is, to which party, *ex æquo et bono*, does the money belong?" (Buel v. Boughton, 2 Den. 91).

The action for money had and received is "denominated an equitable action, and is less restricted by technical rules than most others. It aims at the mere justice of the case, and looks entirely to the question whether the defendants hold money which in equity and good conscience belongs to the plaintiff" (Colville v. Besley, 2 Den. 139, 142).

The defendants have received, and applied to their own use, money which, in equity and good conscience, belonged to the plaintiffs. They came to the possession of it by a misappropriation of it by plaintiffs' factors and agents. The latter, as between themselves and their principals, had no right to, or interest in, such moneys, except as trustees of the plaintiffs. The defendants did not part with any consideration, or incur any liability, or release any right or property for or on account of this money.

There is no analogy between this case and cases like *Butterworth v. Gould* (41 N. Y. 450). The latter case,

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and others like it, hold that where A. is indebted to B. or C., and B. and C. severally claim the debt is due to him, and A. pays the debt to B., that C. cannot recover the money of B. as money had and received to the use of C., even though it may be made to appear that the debt was in fact owing to C. It cannot be regarded as money paid to the use of C., for the payment thus made does not in any respect affect his right still to call on his debtor for payment. The relations, as between himself and A., are not affected thereby. In the present case, the money, which was delivered by Southard & Co. to the defendants, at the time it was so delivered, belonged in equity to the plaintiffs. The payment made by Southard & Co. satisfied their liability for the price agreed to be paid for the lumber. After such payment was made, all claims which the plaintiffs might otherwise have made against Southard & Co. were extinguished. The only title which the defendants can make to the money is through Valentine, Myers & Co., by whose violation of their duty to the plaintiffs the defendants obtained possession of it without paying any consideration therefor.

The defendants further claim that they can defend against this action under that provision of the Factor's Act which declares that the factor's agent, intrusted with the possession of any merchandise for the purpose of sale, shall be deemed to be the true owner thereof, so as to give validity to his contract with any other persons for the sale or other disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument, or other obligation in writing given by such other person on the faith thereof.

It seems to me, with all due respect for the confidence with which this position was taken, and the ability with which it has been supported, that the short and full answer to it is, that Valentine, Myers & Co.,

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the factors and agents intrusted with the possession of the plaintiffs' lumber for the purpose of sale, have not made any contract with the defendants for the sale of any part of such lumber, or for the disposition of any such lumber to the defendants for money advanced by them, or securities given on the faith thereof. The lumber in question was sold and delivered to Southard & Co. The only contract between Valentine, Myers & Co. and the defendants, in relation to this lumber, was made several days after the sale and delivery of the lumber to Southard & Co., and consisted wholly of the transfer by Valentine, Myers & Co. to the defendants, without consideration, of the indebtedness of Southard & Co., for the lumber thus purchased. The money which Southard & Co. paid and the defendants received, at the time it was so paid and received, was the property into which said lumber had been converted, and in equity belonged to the plaintiffs (*Duguid v. Edwards*, 50 *Barb.* 297; *Wallace v. Castle*, 14 *Hun*, 106).

The plaintiffs should have judgment for \$1,624.42, with interest thereon from the time the demand was made upon the defendants therefor. There were no commissions due to Valentine, Myers & Co. for the sale of this lumber.

I have no doubt, upon the evidence, that at the time of this sale they owed the plaintiffs over \$6,000, after crediting themselves with five per cent. commissions on all prior sales.

The above opinion of the referee fully and clearly maintains the conclusions arrived at by the referee, and they are concurred in.

The judgment appealed from should be affirmed, with costs to the respondents.

FREEDMAN, J., concurred.

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GEORGE H. TOWNSEND, PLAINTIFF AND RESPONDENT, v. MILES ROSS, AS SURVIVOR, &C.,
DEFENDANT AND APPELLANT.

COSTS.—SHERIFF'S FEES.

Upon taxation by the judge, the sheriff's bill was allowed \$32.18 for keeper's fees (in charge of a schooner levied upon).

Held, that this allowance to the sheriff was erroneous. The statutory fees and poundage allowed to a sheriff are in full compensation for his services and expenses in executing the writ. He is not entitled to charge for the services of a keeper, in charge of the property levied upon (*Crofut v. Brandt*, 58 N. Y. 106).

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal by defendant from an order, in which the sheriff's fees on an execution were taxed at \$48.92.

Leon Abbett, for appellant.

Almon Goodwin, for respondents.

BY THE COURT.—CURTIS, Ch. J.—The order at special term, opening the defendant's default, required, among other conditions, that the defendant should pay to the plaintiff "the legal fees and disbursements of the sheriff," on the execution issued under the judgment, from which the defendant sought to be relieved.

The bill presented by the sheriff was as follows:

To poundage,	\$8.74
To levy and return fee,	2.69
To notices of sale,	4.00
To expenses incurred,	15.00
To towing schooner from Tottenville to Gowanus,	40.00

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To keeper's fees, 16 days, at \$3 per day,	
16 nights, at \$3, . . .	\$96.00
To compensation to deputy, . . .	20.00
	<hr/>
	\$186.43

Upon taxation by the judge at special term, the bill was taxed at \$48.92, of which amount \$32.13 was allowed for keeper's fees.

The defendant appealed from this order, and claims that the allowance to the sheriff of \$32.13 for keeper's fees was erroneous.

This question, in regard to keeper's fees, appears to have been passed upon adversely to the claims of the sheriff to charge for them (*Crofut v. Brandt*, 58 *N. Y.* 106). It was held, in this case, that the statutory fees and poundage allowed by statute to a sheriff are in full compensation for his services and expenses in executing the writ.

The sheriff incurred expenses in holding possession of the vessel levied upon under the execution, for which the allowance appealed from, of \$32.13, for keeper's fees, seems not unreasonable, but no provision by statute is made for their allowance. There are, perhaps, other services rendered by sheriffs, where the compensation received is more than commensurate with the service rendered. This may have been considered by the learned judge delivering the opinion in *Crofut v. Brandt* (58 *N. Y.* 112), who observes that "in the long run the result, in the contemplation of law, is that the fees which the law prescribes are adequate compensation for the risk and expense incurred."

The claim made, that the order opening the default, in requiring the payment of the sheriff's disbursements, gives a latitude to the court in ordering the expenses for keeper's fees to be paid, and that it rests in its discretion, is not tenable, because the order itself limits the payment required to be made by the defend-

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ant to "*the legal fees and disbursements*" of the sheriff on the execution. If the court at special term had intended, as a condition of opening the default, that fees or disbursements, other than those specified in the statutes, should be paid, it would not have used a term of limitation, debarring the sheriff from requiring payment of charges other than such as the statute (which is the only law under which he can enforce charges without consent of the party) gives him the right to demand.

The order appealed from should be modified by striking out the item "to keeper's fees \$32.13," with costs.

FREEDMAN, J., concurred.

WILLIAM R. McCULLOUGH, PLAINTIFF AND
APPELLANT, v. BENJAMIN THOMPSON, ET
AL., DEFENDANTS AND RESPONDENTS.

PRINCIPAL AND FACTOR.—AGENT.—COMMISSION MERCHANT.

In a sale of goods to a factor or agent, who purchases in his own name, and to whom the credit is given and the merchandise billed and charged, the principal is not liable to respond to the vendor for the price of the goods, where it appears that the principal has paid his factor or agent, for the goods.

In the case at bar, the defendants (being a foreign house) employed one Murphy, a commission merchant, doing business in New York, to purchase goods for them in the latter place, on their orders given from time to time, without reference to the persons or firms from whom he should make such purchases, and they paid Murphy for the goods, and a commission for his service. Plaintiff sold to Murphy some goods that he had been thus ordered to purchase for defendants. Murphy bought in his own name, and plaintiff made out the bills in the name of Murphy, and charged the goods to him, and demanded payment from

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Murphy; but failing to obtain payment, and learning that the goods were purchased for, and delivered to defendants, they seek to recover their value from the latter, although defendants had paid Murphy for the goods.

Plaintiff had no direct personal relations with defendants, although they had information or knowledge that Murphy had orders from defendants to purchase goods for them in New York. They gave the credit to Murphy, and treated him as a principal.

Held, that in such a case, the law does not provide for nor permit the substitution of the principal as a party liable to respond to the plaintiffs, for the merchandise purchased of them by the agent.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal by plaintiff from a judgment dismissing the complaint with costs, entered on the report of a referee.

Isaac L. Miller, for appellant.

Nathan Reeve, for respondents.

BY THE COURT.—CURTIS, Ch. J.—This action was brought to recover \$115.49, the value of certain merchandise, claimed to have been sold and delivered by plaintiff and one James Woolworth, to defendants. Woolworth assigned his claim to plaintiff. The referee found that defendants were a foreign house, doing business in Canada and England; that they employed one J. D. Murphy, a commission merchant, doing business in this city, as their agent, to purchase goods for them on their orders, paying him a commission therefor; that said Murphy, as such commission merchant, purchased in his own name the goods mentioned in the complaint, and that the contract of sale was made with the agent as principal debtor, and not with defendants.

The question presented is purely a question of fact.

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The evidence strongly tends to establish that the plaintiff contracted with the agent Murphy, and not with the defendants. The plaintiff knew, at the time of the sale, that this agent Murphy had been ordered by the defendants to purchase these goods. But did the plaintiff at the time of the sale give the credit to the foreign house, the defendants, or to the commission merchant in New York? It is difficult to reconcile the view, that the credit was given to the defendants, when we find that at the time the plaintiff charged the goods in his books to the commission merchant in New York, with whom he negotiated the sale, and delivered the goods pursuant to his instructions, and to whom he gave the bills thereof, made out against him, and not against the defendants, as the purchaser of them from the plaintiff.

It is somewhat inconsistent with the idea that the credit was given to the defendants at the time of the sale, that payment for these goods was, at various times, during about two months, demanded by the plaintiff from Murphy, the commission merchant, though he was in a straitened condition, and no communication was made to the defendants on the subject, until about the time this suit was commenced. The defendants had in the meantime, paid Murphy for the goods.

This evidence inclines me to think that the plaintiff had no idea, at the time of the sale, of recourse upon the defendants for payment, but that, having casually learned at that time for whom Murphy was purchasing as a commission merchant in the market, upon his omitting to pay, he presented the claim in suit against the defendants.

If the contract was an absolute one between the plaintiff and Murphy, for the sale of the goods and the giving of the credit to the latter, the law does not provide a way, in case of the latter's neglect to pay, by

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which the dealer with him can be substituted involuntarily as the party to respond.

In considering the question in dispute, the referee has had the witnesses, the letters, books and proofs before him. He has had the best opportunity of determining the facts. The evidence in the case sustains the conclusions he arrived at. After considering it, I have been unable to come to any other conclusion than that the goods were sold to Murphy and credit given exclusively to him. There are some exceptions presented in the case, but none that require the granting of a new trial.

The judgment appealed from should be affirmed, with costs.

FREEDMAN, J., concurred.

MORRIS FRANK, ET AL., PLAINTIFFS AND RESPONDENTS, v. THE CHEMICAL NATIONAL BANK OF NEW YORK, DEFENDANT AND APPELLANT.

BANK ACCOUNTS—FORGED CHECKS—PASS-BOOK, SETTLEMENTS AND BALANCES THEREON.—EVIDENCE.

The question as to who should bear the loss, in case of forged checks, and the cases bearing upon the same, discussed (*Leavitt v. Stanton*, *Supplement to Hill & D.* 413; *Weisser v. Denison*, 10 *N. Y.* 68).

In the latter case, the following text, fully cited and approved, "that the bank must be presumed to know the signatures of its dealers, and that it pays forged checks purporting to be signed by them at its peril. That a depositor owes no duty to the bank that obliges him to examine his pass-book after the same had been written up by the bank, and the vouchers or checks returned with it, with a view to the detection of forgeries of his name. That the depositor was bound by the acts of his clerk, only so far as he was acting in the course of his employment."

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In the case at bar, only three of the checks claimed to be forged were produced in court, and defendant claimed that only those could be considered. *Held*, by the court, that if the proof that all the checks were forged, was sufficient, that the referee was in duty bound to find such a conclusion of fact. Their production on the trial was not absolutely necessary.

There was evidence on the trial, as to the existence and nature of alterations, erasures, and tracings in the check and pass-book, and on the forged checks. An oculist testified that a certain magnifying glass was a correct one, and that it magnified four times. The plaintiffs offered the glass in evidence, and handed it to the referee, and requested him to inspect and examine with it the three checks that were produced in evidence, and that were claimed to have been forged, for the purpose of determining whether or not the signatures upon these checks were genuine. To all this, counsel for defendant objected, but the referee overruled his objection, and used the glass, and the defendant's counsel excepted to the decision of the referee, and also to his action in using the said glass. *Held*, that the referee occupied the position of a jury, in determining the question as to the alterations, erasures, and tracings, and he had the same right as a jury to use a magnifying glass in the investigation of material objects. It was proper for him to use the glass, if he could see better with it. It was his duty as a referee, in a case where alterations, erasures, and forgeries were claimed to exist, to resort to the usual and proper agencies that correctly add to or increase the power and capacity of human vision, and consequently of human judgment, in respect to the issues of fact that he was called upon to consider and decide. *Held*, upon the facts and law in the case, that the judgment entered in the court below on the decision of the referee, to the effect, in substance, that defendant should pay the amount of the forged checks, should be confirmed.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal from a judgment entered against the defendant, on the report of a referee, for \$15,794.20.

The plaintiffs bring this action to recover a balance of money they had deposited with the defendant.

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The defendant answered that the money so deposited had been paid out from time to time on the checks of the plaintiffs, and that they had, at various times, rendered their accounts and vouchers for such payments to the plaintiffs, who made no objection to such accounts, and pointed out no errors.

The plaintiffs, who composed the partnership of Frank and Hirsh, opened an account with the defendant in the fall of 1865, and the business relations of the parties were of the character usual between a depositor and a bank. The plaintiffs deposited money from time to time with the defendant, and drew it out on their checks. A bank-book, commonly called a bank pass-book, was kept, in which an entry was made of the moneys deposited by the plaintiffs, and this book was "written up and balanced" from time to time; the defendant entered therein the various amounts paid by it on the plaintiffs' checks, and struck the balance therein, and thereupon returned to the plaintiffs the book with the paid checks, as the defendant's vouchers for the payments made and thus entered.

These business relations continued until after the commencement of this action in 1870, and no complaint was made by the plaintiffs of any irregularity in the account until in September, 1870. Then the claim, which is the subject of this litigation, was that from about July 13, 1869, to September 26, 1870, the defendant had charged in the account as paid, divers sums of money, amounting in the aggregate to \$8,181.38, which were not paid on the plaintiff's checks, or, at any rate, on the genuine checks of the plaintiffs. During this period the bank book had been balanced five times and returned to the plaintiffs with the vouchers, and no objection had been made by them to the correctness of the account, or the balance as struck in this book. On the trial it was claimed that entries of thirty-seven payments made, and which, it appears, were in fact

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made by the bank on thirty-seven checks, were improperly made, on the ground that no such checks had ever been drawn by the plaintiffs, and were forgeries. The plaintiffs produced 392 checks paid by the defendant, which they admitted to be genuine, and also conceded that there were five other genuine checks paid by the bank, which had been lost. Of the thirty-seven checks paid by the bank, which the plaintiffs claimed were forgeries, three were produced, amounting altogether to \$600, and considerable evidence was given in respect to the genuineness of the plaintiffs' signatures to these. The remaining thirty-four checks, amounting in all to \$8,751.63, were not produced by the plaintiffs, and the signatures to these were not open to the inspection or examination of witnesses on the trial. Evidence was introduced tending to show that the forgeries were committed by the book-keeper of the defendants, who attended to their bank accounts, and who absconded about the time of the discovery of the forgeries, having destroyed or concealed the forged checks, except these three checks, which were discovered in the bank after he left.

There have been two trials of this action before referees. It was first referred to HENRY NICOLL, Esq., who reported in favor of the plaintiffs for \$9,189.96. The defendant appealed from the judgment entered on this report to the general term, and the judgment was reversed for error in the reception of evidence. The case is reported in 37 *N. Y. Super. Ct.* 27. It was then referred to WM. G. CHOATE, Esq., who reported in favor of the plaintiffs, and it is from the judgment entered upon his report that the defendant now appeals.

Charles Jones and John E. Roosevelt, for appellant.

Opinion of the Court, by CURTIS, Ch. J.

B. F. Watson, for respondent.

BY THE COURT.—CURTIS, Ch. J.—The first question that comes before us for consideration, is one of fact. Were these thirty-seven checks which were paid by the bank, and alleged by the plaintiffs to be forgeries, such in reality or not? There is a considerable conflict of testimony on this question. The officers of the bank and the expert called by them are confident in the belief that these thirty-seven checks are genuine, and consider them as such.

The plaintiff, who alone conducted the business of the firm in New York, positively denies that the checks were drawn by the firm, or authorized by it, and witnesses are introduced who point out differences between the signatures of the three checks, that were found of the number claimed to be forgeries, and those which are conceded to be genuine. The plaintiffs claimed that the signatures on the spurious notes were traced by being placed over genuine signatures, and then slowly drawn; and that, when magnified by a lens, the indications of irregularity of outline, and of frequent stops in tracing the signatures, were distinctly visible.

Upon the evidence, the referee found for the plaintiffs, evidently giving it a careful consideration. He had the witnesses before him personally; he had the fullest opportunity of judging, where it was conflicting, as to who was best entitled to credit; and the conclusion he arrived at is supported by proofs, to such an extent, that it would be at variance with well-settled rules for this court, on appeal, to set aside his decision on this question of fact, as against the weight of evidence, or as unsustained by the proofs in the case. The checks being forgeries, there is of course no reason for claiming that they were paid in pursuance of any authority from the plaintiff.

The question as to which party should bear the loss, under circumstances analogous to those of the present case, has already been passed upon in the supreme court and in the court of ultimate resort. In *Leavitt v. Stanton*, (*Supp. to Hill & D.* 413), where the plaintiff was in the habit of depositing money with the defendant and drawing on him, and the defendant paid a draft of \$10,000 with plaintiff's signature forged to it, the circumstances which would excuse the defendant from liability to respond to the plaintiff are considered by NELSON, Ch. J., in the opinion delivered by the court. The facts disclosed negligence and suspicion on the part of the plaintiff, when the draft was sold to the felon, but it was held that these facts fell short of gross carelessness, which should, at least, be established, if the principle on which the defendant sought to be exonerated could at all be entertained; and that they were insufficient to charge upon the plaintiff the consequences of the forgery that subsequently happened.

In the case now before us, the bank paid out its own money upon the forged checks, and not that of the plaintiffs, who were strangers to these acts of the bank and in no sense parties to them, or guilty of any gross negligence in respect to them. The bank, after it had thus parted with its own money, charges the sums so drawn out to the plaintiffs, in their account with the bank, who, upon notice, and without delay, refuse to ratify, or be bound by these acts of the bank.

In the case of *Weisser v. Denison* (10 *N. Y.* 68), the bank paid the checks that were forged by the depositor's confidential clerk, charged them in the depositor's pass-book, balanced and returned it to the clerk with the forged vouchers, who examined the account at the depositor's request, and reported it correct. The depositor did not discover the forgeries until many months after, when he immediately notified the bank.

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In the action he brought to recover the balance of his deposit, it was held, that the bank could not retain the amount of the forged checks; that it must be presumed to know the signatures of its dealers, and pay checks purporting to be drawn by them at its peril; that a depositor owes no duty to the bank, that obliges him to examine his pass-book, or vouchers, with a view to the detection of forgeries of his name, and that the depositor was bound by the acts of his clerk, only so far as he was acting in the course of his employment.

In the case before us, the appellant urges that its position is very different from that of the defendant in *Weisser v. Denison*, *supra*, because in that case the checks were produced, and it was proved they were forged by the depositor's clerk, who alone examined the pass-book and returned checks, and reported the result to his principal. In that case the forged checks were found in the trunk of the absconding clerk; in this case only a small part of them were found and that only after the clerk had absconded, but there was also evidence of erasures and alterations of the pass and check-books and of false readings of them by the clerk when they were compared with the account and examined by him and the plaintiff Frank together. I know of no principle of law, that because only a portion of the checks claimed to be forged was found, the referee, or a jury, is inhibited from finding, if there is evidence to warrant it, that the checks not found were also forgeries. If this view prevailed, it would only be necessary for the criminal who had obtained possession of the checks he forged, to destroy or secrete them, and thus secure immunity to the bank paying the forged checks, from any liability to the depositor. The referee, if the proofs made it apparent to him, that the thirty-seven checks in question were all forged, though only three of them could be presented before him, was in duty bound to so find.

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There was evidence at the trial as to the existence and nature of alterations, erasures, and tracings in the check and pass books and the checks. An oculist, being shown a glass, testified that it was correct, and magnified four times. The plaintiffs offered the glass in evidence, and the defendant excepted to its admission.

When the testimony was closed, the counsel for the plaintiffs handed to the referee the magnifying glass thus offered in evidence, and requested him to inspect and examine with this glass the checks produced on the trial and read in evidence, for the purpose of determining whether the signatures to the three alleged forged checks were the genuine signatures of the plaintiffs, or were forged or traced signatures. The counsel for the defendant objected to this, and to the referee's using the glass for that purpose; but the referee overruled the objection, and decided that he would use the glass for that purpose, and he did use the same for such purpose, and the defendant excepted to the decision of the referee, and to such use of the glass.

There was an opportunity to cross-examine as to the glass, and as to its capacity, if the defendant deemed it of any consequence, or had reason to suppose it incorrect. The referee occupied the position of a jury in determining the questions as to the alterations, erasures and tracings. The use of lenses that magnify, as auxiliary to the human vision, is so universally resorted to and adopted, as a necessary factor in obtaining precise mathematical results in the investigation of material objects, that the use of glasses, proved to be correct, in a judicial investigation, where the truth can very possibly only be arrived at by such use, does not seem reprehensible. The referee had the same right as a jury would have had, to look through glasses that magnify. It was proper for him to use the glass, if he could see better with it. It was his duty, in the interest of justice

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as a referee, in a case where alterations, erasures and forgeries were claimed to exist, to resort to the usual and proper agencies, that correctly add to, or increase, the power and capacity of human vision, and consequently of human judgment, in respect to the issues of fact he was called on to decide.

The questions in this controversy have been very carefully and very clearly presented by the respective counsel; but after considering their arguments and briefs, and the evidence and the finding of fact by the referee, and the conclusions of law based upon decisions in cases that appear to be corresponding in their character, and also those of the defendant's exceptions not discussed here, I am led to the conclusion that the judgment appealed from should be affirmed, with costs.

FREEDMAN, J., concurred.

HARVEY M. MUNSELL, PLAINTIFF, v. EDWARD
FLOOD, DEFENDANT.

AGREEMENT—WRITTEN AND VERBAL.

Conversations and verbal arrangements that have resulted in a written agreement between the parties, should not be admitted in evidence to vary or change the written agreement, which must be construed as, and assumed to be the final conclusion of the verbal negotiations or conferences between the parties.

In the case at bar, *Held*, that the written agreement was complete in itself, and did not appear as a supplement or part of the verbal agreement that preceded it, or in anywise dependent upon it, and the verbal agreement was properly excluded.

Certain personal property having been parted with by the plaintiff, and delivered to the defendant, on certain conditions to be performed by the defendant, set forth in the written agreement, and defendant having failed to perform and fulfill the same, the plaintiff was held to be entitled to the return of his property.

Opinion of the Court, by CURTIS, Ch. J.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

At the trial, the court directed a verdict for the plaintiff, to which the defendant excepted. The court directed the defendant's exceptions to be heard, in the first instance, at the general term, and an order to that effect was entered in accordance with section 1000 of the Code of Civil Procedure.

Edgar Whillock, for plaintiff.

Thomas H. Hubbard, for defendant.

BY THE COURT.—CURTIS, Ch. J.—The action was brought to recover from the defendant the possession of a note for \$2,000, made by the plaintiff, and three policies of insurance, the complaint alleging they were wrongfully detained by the defendant from the plaintiff. The answer admits the possession, but denies the wrongful detention.

The plaintiff delivered the note and policy to the defendant, in pursuance of an agreement, in writing, and under seal, executed by the defendant, November 6, 1875, and read in evidence at the trial:

By the terms of that agreement the defendant, in consideration of the note and policies delivered to him by the plaintiff, was to do four things:

I. To release all his right, title, and interest in and to a nail machine to one L. M. Merrill.

II. To surrender every contract, note, insurance policy, &c., held in connection therewith, to this L. M. Merrill.

III. To have his mother assign the patent she held of said nail machine to this L. M. Merrill.

IV. To obtain from his mother, at once, a written agreement to fulfill the above immediately.

The only thing that the defendant did under that

Opinion of the Court, by CURTIS, Ch. J.

agreement, was to procure his mother to execute an agreement, that, at a further day, she would assign the patent to L. M. Merrill. The assignment itself was never executed. The total value of the property detained was found to be \$3,241.23.

The plaintiff made due proffer, in court, to surrender the agreement to assign.

At the argument but two of the exceptions were insisted upon by the defendant, and the discussion was limited to them. The first of these exceptions was one to the ruling of the court, denying the defendant's motion to dismiss the complaint, on the ground that the plaintiff had not shown that, at the time of the commencement of the action, he was either the owner, or entitled to the possession of the property claimed. The remaining exception was one to the ruling of the court, excluding an offer of the defendant to show that he had fully performed, on his part, a previous agreement of January 15, 1875, which had been read in evidence, to which the plaintiff and one L. M. Merrill and himself were parties; but that the plaintiff had failed to perform it, and had failed to put in the money he agreed to, and had carried away the patented machine, and that when he, the defendant, called on the plaintiff for a settlement for the money and the removal of the machine, it was verbally agreed between them, that plaintiff would give defendant, in settlement, the note for \$2,000, and the policies of insurance now in controversy; and that in pursuance of this verbal agreement the plaintiff gave the defendant the note and policies, and that as a supplement to this verbal agreement, and as a part of the consideration for the note and policies, the agreement of November 6 was made between the parties.

It thus appears there was some verbal agreement between the parties previous to the agreement of November 6, 1875. It would be in contravention of

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well settled rules to admit evidence of some former verbal understanding or agreement touching the matter in question, to vary, or affect the terms of a subsequent written agreement, duly executed between the parties, and which the law deems to be the best and final expression of the minds of the parties meeting in unison, after preliminary parol discussion and agreement. The conversations and the verbal arrangements, after they have resulted in a written agreement between the parties, are to be interpreted by what the parties have signed, and not by what may have passed between them verbally, previously to the act of signing.

The agreement in question covers the entire ground, and is complete, as such, in itself. There is no occasion to resort to external matters to explain it. It does not appear to be a supplement to the verbal agreement, or dependent upon it to be sustained. It was properly excluded.

With regard to the first exception, referred to, which was to the refusal of the court to dismiss the complaint, on the ground that the plaintiff was not the owner, or entitled to the possession of the property claimed, the case shows that, being the owner of the policies, and the maker of the note, he parted with them on certain conditions to be performed by the defendant. The defendant failed to fulfill or comply with certain of the conditions that were pre-requisite to these obligations, vesting in him, as his absolute property. The delivery of the securities to the defendant being conditional, upon the defendant's failure to comply with the conditions, the plaintiff was entitled to be reinstated in his original position.

The case shows, that the plaintiff should have the relief he seeks.

The exceptions should be overruled and judgment rendered for the plaintiff with costs.

FREEDMAN, J., concurred.

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HENRIETTA C. HAVEMEYER, PLAINTIFF AND
RESPONDENT, v. JOHN C. HAVEMEYER, ET
AL., DEFENDANTS AND APPELLANTS.*

I. POOLING AGREEMENT.

1. CONSTRUCTION OF.—RIGHTS AND DUTIES OF PARTIES UNDER.

(a) Defendants, owning and controlling a certain amount of a certain stock, and plaintiff, with others, owning a certain other amount of the same stock, entered into an agreement, whereby it was agreed that neither quantity of stock should be sold, unless it was in a sale that included the other, and whereby defendants authorized plaintiff's agent to sell to P. the stock which defendants owned and controlled, for 75 per cent. of its nominal value, and certain bonds owned by them for 90 per cent. of their nominal amount in cash, if P. should put his offer to pay that in writing; and whereby defendants further agreed that during the negotiation they would neither buy stock, nor do anything else to interfere with the negotiations.

HELD,

1. That upon the evidence, taking it most favorably for the plaintiff, the negotiations referred to in the agreement were only those for a sale to P. on the terms specified in the agreement.
2. That upon P.'s declination to purchase on the terms specified in the agreement, and the communication to defendant, by plaintiff's agent, of such declination, with no intimation that he (plaintiff's agent), was about to go on with negotiations with P. to effect a sale to him, the negotiations, pending which defendants agreed to inaction were at an end; and defendants were at liberty thereafter to make such purchases as they might desire.
3. If it is claimed that a purchase by defendant of a quantity

* On a previous appeal (43 *N. Y. Super. Ct.* 506), it was urged that such an agreement as the one in question was illegal and void as contravening public policy; the court, however, sustained the agreement. On that appeal, other questions were also presented, which are not presented by the present appeal book. The questions here presented and decided were not presented on the former appeal.

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of the stock pending the negotiations is a breach, plaintiff should show,

- (a) That such purchase did interfere with the negotiations.
- (b) The damages resulting from the effect of that breach.

The damages recoverable would be proportioned to the proved effect of the breach.

4. A letter sent by plaintiff's agent to P., and answered by P. before the making of the agreement (defendants being ignorant of the letters), in which letter plaintiff's agent stated to P.: "I desire to work in your interest, and not in the interest of those who have the present control. I desire to sell the stock I control, and though I cannot commit myself just yet, I would sell it, at the average price you pay for the balance, which, with mine, would give you a majority of it. I advise you of this, that you may feel assured that if you contemplate purchasing the road, you may depend on the 10,000 or 12,000 shares I hold. . . . I would willingly assist you, if you think I can, in getting the majority of the entire stock"—P. in answer says: "Thanking you for kind offers of assistance, we will, if necessary, make use of them" (the offer contained in the letter of plaintiff's agent not having been withdrawn)—absolved defendants (who were included among those in control), from any duty or obligation they might otherwise be under in respect of the clause for inaction.
5. The negotiations with P. for a sale on the terms stated in the agreement, having come to an end, nothing remains of the agreement, except the provision that neither lot should be sold without the other.

- (a) This part of the agreement (the others having ceased to be operative), could be terminated by either party on notice to the others, and the plaintiff's request for leave to sell separately, acceded to by defendants, annulled the agreement in this respect.

1. This, though plaintiff, at the time of the request, was not aware that defendants had purchased a large quantity of stock, which, with that before held by them, constituted a majority.

II. DAMAGES, MEASURE OF.

1. COMBINING STOCK, DAMAGES FOR BREACH OF AGREEMENT TO.

- (a) VALUE OF STOCK BEFORE BREACH—CHARGE AS TO.

1. Although the price paid on a sale, which is claimed to constitute a breach of an agreement for a combination of

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stock, is competent evidence of the value before breach, and the judge charged the jury that in determining the market value at the time of the breach, they were at liberty to consider the price paid on the sale claimed to constitute the breach, but were not concluded by it, but should consider it in connection with the other evidence on the subject, yet it appearing that the sale was one which gave to the purchaser a majority of the stock, and the complaint stating that the person who became the purchaser, in making the purchase, desired to control a majority of the stock, and for that purpose would pay a larger price than after his purchase could be obtained, and there being evidence tending to prove that without a combination, which would constitute a majority, there was no market value for the stock, and that on a combination of a majority of the stock, a higher price could be obtained, a refusal to charge "that in estimating damages the jury cannot take into account any mere chance of making uncertain profits, nor any speculative value arising from or depending upon the possibility of the plaintiff combining her stock with that of other persons."

Held,

sufficient cause for a new trial.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided December 1, 1879.

Appeal by defendants from judgment and from order denying motion for a new trial.

The complaint stated that Albert Havemeyer died possessed of certain shares of stock of the Long Island Railroad Company. That his administrators, acting by one of them, Henry O. Havemeyer, agreed, in April, 1875, with the defendants, who owned other shares of the stock of the same railroad, that "neither the defendant's stock nor the Albert Havemeyer stock should be sold, or should unite in a sale which should not include the stock of the other party;" that in August, 1875, the Albert Havemeyer stock was partly divided among the distributees of his estate, one of them being the plaintiff.

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iff, and the administrators continuing to hold certain shares which the intestate had held in trust.

That in November, 1875, the said Harry O. Havemeyer, acting for the parties in interest, secured definite proposals from one Poppenhusen for a purchase of the whole of the stock. "He immediately communicated with the defendants on the subject; thereupon the agreement that neither lot of stock should be sold without the other was reiterated between the parties; and it was further agreed that the said Harry O. Havemeyer, acting as aforesaid, should proceed with the negotiation for a sale to Mr. Poppenhusen; that the defendant should aid by obtaining the union of other holders, and that if Mr. Poppenhusen were willing to pay at the rate of seventy-five per cent. of the par value, a sale should be made, and that the defendants would join."

The breaches of their alleged agreements are that about December 14, 1875, "an offer was obtained from Mr. Poppenhusen which would have secured to the defendants, and the parties represented by them, at the rate of seventy-five per cent for their stock. This was communicated to the defendant, and thereupon the defendants, in violation of their agreement previously made, declined to join in the sale."

Another allegation, which may be taken to be a charge of a breach, was that subsequently, and on or about January 26, 1876, the defendants did sell to Mr. Poppenhusen, including their own stock and the stock of other parties, making altogether about thirty-five thousand shares, leaving out the Albert Havemeyer stock.

Further allegations, containing matters upon which the plaintiff, at trial, relied, as making a breach, were that while the defendants were professing to co-operate, and were thus preventing the parties interested in the Albert Havemeyer stock from acting independently to

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effect a sale, they were themselves using the time to, and they did, make an arrangement with holders of stock, with whom they volunteered to communicate for the common benefit, so as individually to represent and control their stock, and particularly the stock which had belonged to Mr. Charlick, "which was not in the arrangement previously referred to. They thus secured the control of a majority, exclusive of the Albert Havemeyer stock: this enabled them to, and they used it, to defeat a sale, which should include the Havemeyer stock, thus causing to the parties interested in that stock the very loss and injury which it had been the object of the arrangement and agreements between them and the defendants to prevent."

On the trial, Harry O. Havemeyer, a witness for the plaintiff, who was her agent through the transaction, testified as follows: "in April, 1875, I stated to defendant (J. C. Havemeyer), that I wished to combine it (that is, the Albert Havemeyer stock) with his, with the view of selling it at the earliest possible time, that there was no market for it unless it was combined with enough of the stock to form a majority, and I wished to combine, so that his stock should not be sold without mine, and my stock should not be sold without his, as our influence together was sufficient to control the other fifteen thousand shares so as to form a majority. He stated that he was perfectly willing to enter into such a combination, provided the management of the road should go into their hands." On his direct examination, he was asked, "Will you state all that was said on the subject of an arrangement to unite the stock which you represented with any stock which John C. Havemeyer stated he or the defendants represented or controlled, in that interview?" His answer was, "We were to unite the stock; I said that I wished to combine my stock with his and the stock he represented in these fifteen thousand shares to oust Mr. Charlick

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from the management of the road, to combine it, and that neither part of the stock should be sold without including in the sale the other, to combine it so that when an opportunity offered for its sale, that a majority of the entire road could be sold, and thereby bring a higher price. He said that he was perfectly willing to enter into such a combination, provided I gave him the management of the road. . . . I said I would consent to that."

The witness stated that he began negotiations for a sale of a majority of the stock to Mr. Poppenhusen, that in the course of them the defendants had expressed their willingness to sell their stock at seventy-five per cent. and certain bonds of railways they owned at ninety per cent. He said he began these negotiations in September, 1875, and continued them down to December 15, 1875. He further said that on November 24, 1875, he had an interview with the defendants, and that "I told John I had called to renew our agreement, and that I wanted him to state again, that he would sell his stock at seventy-five cents and his bonds at ninety cents, and I wanted also his brother Henry to say so: that the negotiations had reached a point where they were to be consummated, and I did not wish to have any misunderstanding about it. . . . I said then, John, you authorize me to sell a majority of the stock at seventy-five cents and the bonds at ninety cents. He said he did. I addressed the same question to Henry, and he said yes. I said this is a transaction that involved \$1,250,000 and they must pledge themselves not to have any transaction in the stock in any way; that they must neither buy nor sell; that the position must remain exactly as it was as in the event of its not being sold, the position was to remain unchanged. . . they stated that they would. . . all this was acquiesced in."

The question was then asked, on the direct ex-

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amination, "At that interview, were the terms of what you call the agreement repeated, and if so, what was said upon the subject of what the agreement was? You said you wished to renew the agreement?" The witness answered, "I recall that John stated, 'Suppose you cannot get the price, suppose the negotiations fall through?' and I stated that the affair was to remain as it was, until some arrangement is made, and he stated that was all right." The witness testified that the defendants required that Poppenhusen's proposition to buy must be in writing.

In a deposition taken in another action the witness testified in reference to the interview of November 24: "John C. Havemeyer said that pending the negotiations with Messrs. Poppenhusen, they would have no transactions in the stock in any way, shape or manner. neither buy nor sell, nor do anything to depreciate. I stated the same, that I did not wish to have anything transpire that would interrupt the negotiations, neither were to buy or sell or have anything to do, the situation should remain just as it was. Q. What, if anything, was said about how long any such arrangement should continue; what was said about time in that interview? A. Pending the negotiations nothing was to be done, no stock was to be bought, no stock was to be sold. Q. Was any period of time mentioned in the interview having reference to any matter; was anything said about time that you now recall in that interview; I mean about some time in the future? A. In the event of the sale not being consummated, we were to meet and decide what to do with the stock. Q. I wish to know whether, in reference to any subject mentioned in that interview, you talked over any fixed and definite period of time or number of years, during which anything was to continue? A. Nothing was to be done pending the negotiation, that is a matter of time; in the event of their not being successful the

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situation was to remain, as it always had been, until some other arrangement had been made ; that was the understanding. Q. With reference to that, was any number of years spoken of? A. Three, I think. Q. If it was said in that interview what was to be done or what was not to be done for three years or any other number of years, I want you to state to the jury what was said. A. I recollect of something being said about three years. I don't exactly recollect what it was." On the present trial, the witness was not able to testify that a period of time of the kind referred to had been mentioned, or if it had been, to what it was applied.

The testimony in reference to supposed breaches of agreement, by defendant, was in substance, that on November 19, one of the executors of Charlick, on request of defendant, called at the house of defendant Henry H., in reference to the Charlick stock. There was another interview on November 26, or 27. The definite purpose of these interviews, or what was done at them, is not disclosed by the evidence. The plaintiff read as evidence on her own behalf, from the deposition of one of the defendants on this point the testimony: "We went to learn, first, whether they had been approached for the sale of their stock; second, what the feeling of Mr. Charlick was toward us, whether friendly, and whether they were willing to sell, and if so, at what price." The stock of Charlick's executors was, after several other interviews, purchased by the defendant on December 11. On December 15, plaintiff's counsel wrote to defendant: "To prevent the possibility of misunderstanding, I think it better to put in writing what passed between us, this morning. What I asked was, whether you desired to join in the sale of the L. I. R. R. Co. Your answer was you did not." To this one of the defendants made a memorandum: "I declined to join in further

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negotiations for the sale of the L. I. stock I hold and control."

About January 25, 1876, the defendant sold the stock they owned and controlled to Poppenhusen, for 75 cents on the dollar.

The testimony on which the defendant relied as showing that, if there were an agreement of the kind testified to by the plaintiff's witness, the plaintiff had committed the first breach, was in substance as follows. Before the interview of November 24, the plaintiff's agent, H. O. Havemeyer, had written to Mr. Poppenhusen the following letter :

"DEAR SIR :—A Mr. Godefroy has had some conversation with me, regarding the stock held by the estate of the late Albert Havemeyer. Will you be kind enough to inform me, if you contemplate purchasing a controlling interest in the Long Island Railroad? Not knowing Mr. Godefroy, I am not sure that he is authorized to represent you in this matter.

"What you choose to tell me, will be regarded strictly as confidential, as in this matter I desire to work in your interest, and not in the interest of those who have the present control. I desire to sell the stock I control, and could sell it, though I cannot commit myself just yet, at the average price you pay for the balance, which, with mine, would give you a majority of it. I advise you of this, that you may feel assured, that if you contemplate purchasing the road, you may depend upon the 10 or 13,000 shares I hold.

"The sale of this stock is of such importance to the persons I represent that I would willingly assist you, if you think I can, in getting the majority of the entire stock. An early reply will oblige.

"Yours truly,

"H. O. HAVEMEYER."

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On the same day, and before the interview with the defendant on that day, Mr. Poppenhusen wrote to Mr. H. O. Havemeyer :

"In reply to your favor of to-day I beg to say, that Mr. Godefroy is authorized to act for us, in the matter of L. I. R. R. stock.

"Thanking you for kind offers of assistance in the matter, we will if necessary make use of them."

The defendants were not informed of this letter or answer.

The explanation by Mr. H. O. Havemeyer of his letter was, that shortly before his writing it he had been told by Mr. Godefroy, that the defendants would be treacherous to him, and he wrote this letter, that he might proceed to sell the Albert Havemeyer stock, if they were treacherous, or, as stated by the learned counsel for plaintiff, "he explains that the reference was to the agreement between him and the defendants, which made it impossible for him to sell, and that the letter was written on an apprehension that the defendants intended to act treacherously, so that if they did, he might be in a position to protect himself so far as possible."

From November 24, Mr. H. O. Havemeyer proceeded to negotiate with Mr. Poppenhusen for a sale of the stock and bonds, on the terms limited by the defendants. On December 2, Mr. Poppenhusen wrote to Mr. H. O. Havemeyer, "I beg to inform you, that your proposition of yesterday, made to me verbally, cannot be accepted, but that we should be willing to close the matter on the basis submitted to you this morning."

On the same day, December 2, Mr. H. O. Havemeyer wrote to the defendants :

"The proposition for the sale of the L. I. stock

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and bonds to Mr. Poppenhusen has been declined by him, and he has submitted one in return, which I have not submitted to you, for the reason that you expressed no desire to entertain anything different from that agreed upon, viz., cash."

After that time, the defendants gave no authority to Mr. H. O. Havemeyer to sell the stock held or controlled by them, but he made some negotiations with Mr. Poppenhusen on the subject, and received an offer upon terms which the defendants had not agreed to take.

Before the letter of plaintiff's counsel, written December 15, Mr. H. O. Havemeyer, on December 14, saw one of the defendants and said, "I have sold the road." He referred to a sale which he supposed Mr. Poppenhusen would make on other terms than those that had been agreed to by the defendants. The defendant answered, "I do not wish to sell." I remonstrated with him. He said, "I don't wish to sell." I said, "Do I understand you to say you will not sell?" He said, "I will not sell." Then I said, "I suppose I am at liberty to sell my stock." He said, "You are." Then I left him. That was the last conversation he ever had with the defendants.

Immediately thereafter, Mr. H. O. Havemeyer endeavored to sell the Albert Havemeyer stock, irrespective of the defendants' stock.

At the request of the plaintiff's counsel, the court charged: "First. If the jury find, from the evidence, that before the election of April 13, 1875, there was an agreement between the defendants and Harry O. Havemeyer, he acting for the parties interested in the Albert Havemeyer stock, by the terms of which the stock represented by Harry O. Havemeyer and that which the defendants represented that they owned and controlled, should be combined for the purpose of improv-

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ing its value by a change in the management of the road, with a provision that neither stock should be sold without including the other—that such agreement was made in view of the danger that either lot of stock might unite in a sale to Poppenhusen, leaving out the other, and that thereby the other would lose the benefit of a sale at a full price, and might become largely depreciated in value; that in pursuance of such agreement the management and control of the road passed into the hands of the defendants; that this agreement was renewed in the fall of 1875, after the division of the Albert Havemeyer stock, and the transfer to the plaintiffs of the nine hundred and twenty-six shares, Harry O. Havemeyer still continuing to represent the Albert Havemeyer stock, and that a further agreement was then made, that if a sale could be effected at seventy-five cents on the dollar, the defendants would include the Albert Havemeyer stock and the stock which they owned and controlled, and that the negotiation of such sale should be put in the hands of Harry O. Havemeyer, with a further provision that, during the negotiation, the defendants should neither buy stock, nor do anything else to interfere with negotiations; and if the jury are further of the opinion that such agreement was broken by the defendants,—then they are responsible in damages for the loss which thereby resulted to the plaintiff. Second. If the jury find, from the evidence, that, while Harry O. Havemeyer, and the parties represented by him, were acting according to the provisions of such agreement, and were negotiating for a sale, the defendants were engaged in making preparations to enable them successfully to break it, and to defeat a sale of plaintiff's stock; that, for that purpose, they procured the undivided control of some seven thousand shares of stock held in Philadelphia, that they purchased the Charlick stock, consisting of some nine thousand and odd shares

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at sixty-five ; that as soon as they felt themselves strong enough to defeat the agreement they refused to unite in the sale, but, instead, made arrangements with other stockholders, by which they were enabled to combine a majority of the stock, excluding the Albert Havemeyer stock, but including the defendants' purchased stock ; that they then sold to Mr. Poppenhusen at seventy-five cents on the dollar ; then the plaintiffs are entitled to recover the difference between the fair cash and market value of the plaintiff's stock at the time of the breach, and the amount to which the value was reduced by the action of the defendants, with interest."

The court also charged : " The plaintiff also claims that on November 24, 1875, after the division of the Albert Havemeyer stock among the next of kin entitled thereto, and the transfer to the plaintiff of her nine hundred and twenty-six shares of stock, the agreement of February, 1875, was renewed, in so far as it prohibited those interested in the stock derived from Albert Havemeyer and the defendants from selling or uniting in a sale which should not include the stock of the other parties, unless with the consent of the other party ; that it was further agreed at that time, between Harry O. Havemeyer, as the representative of the Albert Havemeyer stock, and the defendants, that if sale could be effected at seventy-five cents on the dollar, the defendants would include the Albert Havemeyer stock and the stock which they themselves owned and controlled ; that the negotiation should be put in the hands of Harry O. Havemeyer, with a further proviso, that pending the negotiation for a sale, the defendants should neither buy stock nor interfere with the negotiation." And that, " if it be proved by the evidence, that such an agreement was actually entered into by the defendants with those who owned and had the right to control the disposition of the Albert Havemeyer stock, and such agreement had not been

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abandoned by the parties, and was subsisting and in force, when the defendants purchased the Charlick stock in December, 1875, and sold their stock to Poppenhusen in January,*1876, and such purchase and that sale was made without their consent, then there is such a breach of the agreement as will entitle the plaintiff to recover damages."

The jury found a verdict for plaintiff.

G. W. Bangs, attorney, *F. N. Bangs* and *John K. Porter*, of counsel, for appellants.

J. Hampden Dougherty, attorney, and *John E. Parsons*, of counsel, for respondents.

BY THE COURT.—SEDGWICK, J.—An outline of the case is that the plaintiff, and others, were the owners of a quantity of the shares of the stock of the Long Island Railroad Company. The defendants owned and controlled another quantity of that stock. The plaintiff and her associates, acting by an agent, and the defendants agreed that neither quantity of stock should be sold, unless it was in a sale that included the other quantity, and the defendants then authorized plaintiff's agent to sell to Mr. Poppenhusen the stock which defendants owned and controlled, for seventy-five per cent. of its nominal value, and certain bonds owned by them for ninety per cent. of their amount, in cash, if Mr. Poppenhusen should put his offer to pay that in writing. The defendants further agreed that during the negotiations for the sale, they would neither buy stock nor do anything else to interfere with the negotiations.

Plaintiff's agent then began negotiations for a sale on these terms. While they were on foot, the defendants had interviews with the executors of Mr. Charlick, to learn if they would be willing to sell to the defendants stock of the same railroad owned by the executors,

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and on what terms. On December 2, the plaintiff's agent wrote to the defendants, that Mr. Poppenhusen had declined the proposition for the sale of the stock and bonds, but had submitted one in return, which the agent did not submit to the defendants, for the reason that they had expressed no desire to entertain anything different from that agreed upon, viz.: cash. On December 11, the defendants bought from the executors of Charlick, their stock, at sixty-five per cent. of the nominal value. On December 14, the plaintiff's agent, in ignorance of the purchase of the Charlick stock, obtained from the defendants leave to sell the stock in which plaintiff was interested, by itself, and proceeded to attempt to sell it without including defendants' stock.

On January 26, 1875, the defendants sold to Mr. Poppenhusen the stock owned and controlled by them for seventy-five per cent. in cash. The plaintiff claimed that the purchase from Charlick's executors and the sale to Mr. Poppenhusen, were violations of defendants' obligations to plaintiff.

After all the evidence was in, the defendants' counsel moved to dismiss, upon several grounds. One of them was that "even if the pretended agreement was made, continuing and valid, the purchase by the defendants of the Charlick stock on December 11 (the negotiation for a joint sale, pending on November 24, having ended on December 2), was not a breach of such agreement." They also asked the court to charge, that "the evidence conclusively shows, that on or about December 14, 1875, and before the sale to Poppenhusen, which is complained of by the plaintiff, the plaintiff was by the consent of the defendants released from any further obligation, to hold her stock or keep it out of the market."

A further request to charge was, that the conduct of the parties after December 14, 1875, as established by

Opinion of the Court, by SEDGWICK, J.

undisputed evidence on the part of the plaintiff and given by the witness, Parsons, is inconsistent with the theory, that after that date there was any binding contract or obligation in force between the parties. They also asked the court to charge, that "the purchase by the defendants, at the time and under the circumstances given in evidence, of the stock known as the Charlick stock, was not a breach of any contract established by the evidence to have been made at any time between the plaintiff and the defendants;" also, that "upon the whole case, the defendants are entitled to a verdict."

Beyond controversy, the complaint does not set out any contract of which the purchase of the Charlick stock was a breach.

The court instructed the jury to find whether the parties, before April, made any arrangement with a provision "that neither lot of stock should be sold without including the other," and whether this agreement "was renewed in the fall of 1875;" "and a further agreement then made, that if a sale could be effected at seventy-five cents on the dollar, the defendants would include the Albert Havemeyer stock, and the stock which they owned and controlled, and that the negotiation for such sale should be put in the hands of Harry O. Havemeyer, with a further provision that during the negotiation, the defendants should neither buy stock nor do anything else to interfere with negotiation."

Of course, the purchase of the Charlick stock did not violate the provision, "that neither lot of stock should be sold without the other." Was it a violation of the other provision, that "during the negotiation the defendants should neither buy stock nor do anything else to interfere with the negotiations?" By the charge (and upon it the jury found for the plaintiff), the negotiations, during which the defendants agreed not to buy stock and not to do anything to interfere

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with negotiations, were "the negotiations for such sale." The sale referred to was one to be made for cash, at seventy-five per cent. for the stock, and ninety per cent. for the bonds, if a written proposition to buy on those terms should be made by Mr. Poppenhusen. The evidence shows that such was the sale, although the charge refers to it as a sale for seventy-five per cent. for the stock alone. The evidence, by the construction most favorable to plaintiff, shows that defendants' promise referred only to negotiations for a sale of the kind that has been described. The witness, on this point, for plaintiff, was her agent, and he testified: "I told John . . . I wanted him to state again that he would sell her stock at seventy-five cents, and his bonds at ninety cents, and I wanted also his brother Henry to say so; that the negotiations had reached a point where they were to be consummated." After testifying to defendants' consent to this, he continued, "that they must neither buy nor sell, that the position must remain exactly as it was, as in the event of its not being sold, the position was to remain unchanged."

It should be here observed, that the complaint did not state or base any claim, upon an agreement "that the position was to remain unchanged." The plaintiff on the trial did not make any claim upon it; nor did the charge of the court leave it to the jury, or in any way refer to it. Its significance here, is to show, that the negotiations referred to were those for the specific sale mentioned in the testimony.

The witness proceeded to say, "I recall that John stated, 'Suppose you cannot get the price; suppose that negotiations fall through,' and I stated then the affair is to remain as it was, until some new arrangement is made."

The testimony of the witness on another trial, read on this was, "I stated to John, that my negotiations for obtaining a bid for seventy-five for the stock, and ninety

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for the bonds would probably be successful, and, in connection with that," John C. Havemeyer said that, pending the negotiations with Messrs. Poppenhusen, they would have no transactions in the stock in any way, shape or manner; neither buy nor sell, nor do anything to depreciate; I stated the same, that I did not wish to have anything transpire that would interrupt the negotiations."

The next question is, did the evidence incontrovertibly show that the negotiations had ended, before the defendant bought the Charlick stock on December 11. On December 2, the witness wrote to the defendant this letter. "Dear sir: The proposition for the sale of the Long Island stock and bonds to Mr. Poppenhusen has been declined by him, and he has submitted one in return, which I have not submitted to you, for the reason that you expressed no desire to entertain anything different from that agreed upon, viz: cash." It must be seen, that the defendants were notified, that the negotiation for seventy-five cents for the stock, and ninety cents for the bonds in cash, had been ended by Mr. Poppenhusen declining to make the purchase, and making a counter proposition, which plaintiff's agent did not think worth while even to describe to the defendants.

The letter gives no intimation to the defendants, that the agent was about to go on with negotiations. If he did so, they were new negotiations, for himself, and not authorized by defendant. There is no proof that before December 11, he ever informed defendants that he was continuing negotiations with Mr. Poppenhusen. He testified that he had one interview with the defendants between November 24 and December 14. He does not fix the date of this interview, or describe its contents, so that it would appear to refer to negotiations after December 2. On the other hand, his testimony was, that it might have occurred on the Monday after

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November 24. If there were in fact any negotiations of any kind, after December 2, there was no testimony that they were for a sale on the terms prescribed by defendants, for, whenever the negotiations took place, the only testimony as to their character was such as could be inferred from their consummation, viz., a written offer by Mr. Poppenhusen to buy on terms, which had not been acceded to, and which the defendants were not bound to accept as the court upon the trial charged. In this way it appeared on the trial by evidence, against which the jury could not find, that the negotiations referred to in the promise, had ended on December 2, and also that the agent of plaintiff had informed the defendants and led them to believe that they had ended. From this time, the defendants were not bound by any agreement to refrain from buying stock.

There was no proof that the purchase of the Charlick stock, or the bargaining with the Charlick executors for its purchase "interfered with the negotiation," to use the words of this charge. No proof was given on the subject. Least of all, was there anything tending to show that this purchase or bargaining had the effect of influencing Mr. Poppenhusen to decline the defendant's terms. If this had been a ground of a recovery by plaintiff, it would have been necessary to tell the jury that the plaintiff could recover for such damages only as the evidence showed she had suffered from that breach. The damages would have been proportioned to the proved effect of the breach.

Moreover, if the liability of defendant arose from their having "interfered with the negotiations," the just conclusion from the evidence is that the conduct of plaintiff's agent was such that the agreement on this point ceased to be binding upon the defendants before any alleged breach by defendants. On the day of the alleged agreement, and before it was made, the

Opinion of the Court, by SEDGWICK, J.

plaintiff's agent wrote to Mr. Poppenhusen the letter of November 24, and also received an answer to it. The defendants made the agreement in ignorance of these letters.

The agent of plaintiff testified that that part of the letter which stated "I cannot commit myself just yet," referred to his being at that present time bound to sell the stock, in respect of which he was agent, with the defendants' stock, and not separately, and that he wrote the letter from a fear that the defendants would be treacherous, and would endeavor to sell their stock apart from plaintiff's stock. Whatever was the motive, and if good or otherwise, the letter informed Mr. Poppenhusen that in case the plaintiff's agent ceased to be committed, he would sell to Mr. Poppenhusen the large amount of stock he controlled, which was, in fact, about one-third of a majority of the stock, and would assist him in getting enough besides to make a majority, and would act against "those in control," which phrase included the defendants. He knew the fact, that it was in Mr. Poppenhusen's power to release him from his committal to defendants, by refusing to buy on the terms which defendants had prescribed, and which he was about to present. He thus influenced Mr. Poppenhusen's mind against agreeing to defendants' proposition. He presented a motive that was unfavorable to defendants, and Mr. Poppenhusen's answer, that if necessary he would act upon the kind offer, shows the effect.

In substance, the agreement of defendants to allow the plaintiff's agent to negotiate for a sale of defendants' stock, was, as argued by the counsel for defendants upon the trial, "a mere authority to Henry O. Havemeyer." Its tenor professed or purported no more. There was no antecedent obligation of defendants to sell their stock, or to place it in the hands of plaintiff's agent for sale. The plaintiff's agent or the plaintiff

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had no interest in the subject matter of the authority ; that is, the defendants' property. In this way the plaintiff's agent became defendants' agent to negotiate, and was bound to the utmost fidelity to defendants, and could not rightfully continue to be agent after a violation of any of his obligation. The plaintiff was bound by his acts.

If the arrangement be considered as an agreement, its promises were mutual. The letter referred to was a first violation of the agreement, and was such a breach that, thereafter, the agreement came to an end, and therefore the defendants ceased to be bound by it. Or if it be considered only as an authority to an agent, his violation of his duty as agent terminated his power to bind his principal, or to continue to act for him.

It was suggested that, as the letter was sent and answered before the arrangement of November 24, it could not be a violation of the agreement then made. But the effect was operative, after the negotiation began, as the answer to the letter shows. It is for the effect that there was responsibility. The offer contained in the letter was not withdrawn, but, as it contemplated, remained in the hands of Mr. Poppenhusen, to await the result of the negotiation of defendants' proposition.

After the arrangement in respect of the sale, on defendants' terms, ceased to bind the defendants of the so-called agreement, remained only the provision that neither lot of stock should be sold without the other. This did not forbid any purchase that either party chose to make. Either party might bring it to an end at pleasure, before a breach. Giving to it the greatest force that can be claimed for it, either party could end it by notice. Its benefit to the parties was, that it tended to give an opportunity for the sale of the two lots of stock together ; but it did not bind either party to make a sale. Either party could obtain the power

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to sell separately, by a notice ending the agreement. Without going into the question of whether the arrangement possessed the constituents necessary by law to a contract, or, particularly, of whether there was sufficient consideration, it will not be doubted that the only consideration that sustained the contract was the mutual promise not to sell separately. When the promise ceased to be mutual, the contract ceased. By the undisputed testimony, plaintiff's agent had failed to bring about any arrangement which could include defendants' stock, upon the terms which the defendants rightfully demanded. There was no prospect of future co-operation. All efforts had been exhausted. On December 15, the agent acting for plaintiff asked defendants if he were at liberty to sell, separately, the stock he acted for. The defendants, by assenting, gave the liberty. This was nothing else than an annulling of plaintiff's promise, which was the consideration to defendants. It, in fact, annulled the agreement, for that was a mutual promise. It was not less than a notice by plaintiff that the mutual understanding was to end, and as to defendants, the parties to whom the notice was given, they might treat the agreement as then ended.

It was argued that such a construction should not be given, because, at the time, the plaintiff's agent did not know that the defendants had bought the Charlick stock. It cannot, however, be inferred that, if he had known it, it would have made him the less desirous to have the power of acting apart from the defendants. But, without going further in this direction, it is sufficient to say that, from views already expressed, it results that the defendants were under no obligation to inform plaintiff's agent of the Charlick purchase. After plaintiff's agent had received permission to sell her stock, he attempted to sell it by a negotiation, and in a manner that was inconsistent with the exist-

Opinion of the Court, by SEDGWICK, J.

ence of an agreement, that the two parcels of stock should not be sold separately. As the agreement came to an end on December 14, the defendants could rightfully sell, on January 27, to Mr. Poppenhusen, their own stock, without including the plaintiff's.

I am further of opinion, that the court should have charged, as requested by defendants' counsel, that "in estimating damages, the jury cannot take into account any mere chance of making uncertain profits, nor any speculative value arising from or depending upon the possibility of the plaintiff combining her stock with that of other persons."

The court charged, in accordance with the former decision of the general term, that the measure of damages would be the amount in which the market value of the plaintiff's stock was lessened by a breach of the contract by defendants. The general term expressed the opinion that the defendants' sale to Poppenhusen was some evidence of market value. And on this trial the court said to the jury: "The measure of damages for a breach by defendants of this contract, if there was such an agreement, would be the amount of any depreciation, in the fair cash and market value of the plaintiff's stock, occasioned by the breach. You are to determine, from the evidence, what was the market value at that time, and you are at liberty in this connection to consider the price paid by Poppenhusen, as bearing upon that subject. You are not, however, concluded by such a price in estimating the value, but you may consider it, in connection with the other evidence on this subject." It stood then, in this wise: the jury was charged that they might find, if the evidence justified it, that the sale to Poppenhusen was a breach; that they must find what was the market value before the breach, taking as some evidence the price paid by Poppenhusen, and then what the market value was after the breach.

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This sale, as some evidence of market value, was evidently of serious practical importance. It had a tendency to increase the amount of damages to the extent that the price paid represented in the minds of the jury—real market value. If that price paid was, in fact, above market value, the jury should have disregarded the excess. If there were facts tending to show that this sale was brought about by considerations on the part of Poppenhusen, which could not have influenced the market generally, the jury should have taken those facts, in connection with their conclusion from the evidence, as to the probability of the plaintiff having been able to make a sale, of a kind like the one to Poppenhusen. The jury should have found whether it was probable that the plaintiff, or those associated with her, could have procured a sufficient amount of the stock to be a majority of the stock; and also to what extent the price given by Poppenhusen was influenced by the sale being of a majority. If the evidence satisfied the jury that Poppenhusen would not have paid the price he did, unless for a majority of the stock, and it was only possible that the plaintiff could have procured a majority, or her chance to do it was only speculative, the jury, in using the sale as evidence, should not have enhanced the market value by such part of the price paid, as came from the fact that a majority was sold. In other words, to the extent that it was only possible or speculative whether the plaintiff could have made a sale like the one to Poppenhusen, the jury should have disregarded the price paid by Poppenhusen.

Some facts that appeared in the case may be adduced here. The complaint stated that it was well known by the parties "that one Adolph Poppenhusen and others co-operating with him, desired to purchase a majority of the stock of the company, and that he would pay for a majority a much larger price than

Concurring Opinion of FREEDMAN, J.

after his purchase could be obtained for the other stock," and further, "that by the action of the defendants, the Albert Havemeyer stock has been placed in a minority of the stock of the company and its market value has been made worth, not to exceed twenty per cent. of its par value, instead of seventy-five per cent., at which it could have been sold if the defendants had not been guilty, &c." The plaintiff's agent gave testimony of the market value before the agreement which was applicable by the jury to the time immediately before the breach. He testified that he told the defendants, that without a combination, there was no market value for the stock; and again, that there was no market for it, unless it was combined with enough of the stock to form a majority; and again, that a majority of the entire road could be sold and thereby bring a higher price.

There was, therefore, some evidence for the jury, that to get the price afterwards paid by Poppenhusen it was necessary to secure control of a majority, and it would have been a substantial aid to the jury to instruct them, that the damages were not to be founded upon a speculative chance that the plaintiff might have been able to offer a majority for sale.

For these reasons I am of opinion that there should be a new trial.

Judgment reversed, and new trial with costs of the appeal to the appellant to abide the event.

SPEIR, J., concurred.

FREEDMAN, J.—[Concurring.]—I concur in the reversal upon the ground last stated in the opinion of Judge SEDGWICK, viz.: that it was error to refuse to charge, as requested by defendants' counsel, "that in estimating damages, the jury cannot take into account any mere chance of making uncertain profits,

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nor any speculative value arising from, or depending upon the possibility of the plaintiff's combining her stock with that of other persons."

ALBERT SCHULTE AND JOHN A. SCHULTE,
PLAINTIFFS AND APPELLANTS, v. JAMES AN-
DERSON, DEFENDANT AND RESPONDENT.

I. PARTNERSHIP AGREEMENT.

1. CLAUSES.

1. One providing that one of the partners shall contribute towards the capital the assets of a former firm represented on the books of that firm as bills due, or to become due (nothing being said in the agreement about the value of said assets—their nominal value however, was \$16,169.36, and real value but \$3,876.75), and that the other partner should put in \$14,000 (in fact he only contributed \$11,848.90).
2. One providing that the profits should be shared, and all losses borne and paid equally.
3. One providing that each partner might draw weekly a certain specified sum for his own use (each drew in excess of the specified sum).
4. One providing that at the termination of the partnership, the remaining assets should be divided between the partners, to each his proper and respective proportion, reference being had to the capital stock put in and invested by them respectively.

2. ACCOUNTING UNDER SUCH AGREEMENT, ON ITS TERMINATION.

(a) PRINCIPLES, WHERE THERE HAS BEEN A LOSS.*

1. The amount of capital which plaintiffs failed to put in should be treated as assets.
2. The excess drawn by each partner, for his own use, should be treated as assets.

* The application of the principles laid down in the opinion to the case at bar, will lead, it would seem, to a judgment in favor of plaintiffs against the defendant, for about the sum claimed by the appellant's points.

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3. The amounts collected by each partner, and retained by him, should be treated as assets.
4. The amount of the losses (no part thereof having been paid back into the firm by either partner), should be treated as assets.
5. The sum drawn by one partner for his own use, in excess of that so drawn by the other, cannot be charged against the former, in favor of the latter, for equalization.
6. The partner putting in the assets of the former firm, must be regarded as having contributed to the capital stock only the actual value thereof.
7. The total amount of assets (including therein the first four items above mentioned) should be divided between the parties in the proportions as \$14,000 is to \$3,876.75, and each party should be considered as having received, on account of his share, the amount he had omitted to pay over under his obligation to share equally the losses, *i. e.*, one-half of the losses.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided December 1, 1879.

Appeal from judgment entered on report of referee.

This action was brought for the adjustment and settlement of partnership accounts of the firm of James Anderson & Co. The complaint averred, and the answer admitted, a dissolution of the firm. A receiver was appointed in the action. An order was made, referring the action to a referee, to take and state the accounts. The referee made his report, upon which judgment was entered in conformity therewith, in favor of defendant against plaintiff, for \$864.68, besides costs, &c.

Plaintiffs appealed. The appeal came before the court upon the report and exceptions thereto only.

The partnership agreement, in addition to what is set forth in the report, provided as follows:

"And it is further agreed by and between the parties to these presents, that the said James Ander-

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son, party hereto of the first part, may draw from the cash of the joint stock the sum of \$50 weekly, for his own use, and at the expiration of each year, the sum of \$2,000, the same to be charged to his account ; and that the said Albert Schulte, party hereto of the second part, may draw from the cash of the joint stock the sum of \$25 weekly, for his own use, the same to be charged to his account ; and also that the said John A. Schulte, party hereto of the third part, may draw from the cash of the joint stock, the sum of \$25 weekly, for his own use, the same to be charged to his account ; and the said Albert and John A. Schulte may, at the expiration of each year, draw jointly the sum of \$2,000, to be charged to their accounts in equal portion, and neither of them shall take any further sum for his own use, without the consent of the other parties hereto, to be signified in writing."

The referee found as matters of fact :

"*First.* That on or about the twelfth day of April, 1875, the plaintiffs and defendant entered into a co-partnership agreement in writing to carry on the business of produce commission merchants, at the city of New York, under the name or firm of James Anderson & Co., to commence on the first day of May thence next ensuing, and to continue for three years thereafter.

"*Second.* That in and by said agreement the defendant herein, party thereto of the first part, agreed to put in and contribute towards the capital of said firm all the assets of a certain former firm, of which he had been a member, but then lately dissolved, known as Dunn & Anderson, and represented on the books of said firm as bills due or to become due (except \$1,500 thereof reserved to defendant), as his share of the capital stock of said firm of James Anderson & Co., and said plaintiffs, the parties of the second part to

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said agreement, therein and thereby agreed to put in jointly the sum of fourteen thousand dollars, which, with the contribution aforesaid of defendant, should form and constitute the capital of the said copartnership; it was also agreed therein that all the profits and losses of said copartnership should be shared and borne one-half by the plaintiffs and one-half by the defendant, but at the end or sooner termination of said copartnership, the remaining assets should be divided between the partners, reference being had to the capital stock put in and invested by them respectively.

"*Third.* That said firm commenced business on said first day of May, 1875, as required in and by their said copartnership agreement.

"*Fourth.* That said defendant, pursuant to said agreement, put in and contributed towards the capital stock of said firm all the aforesaid assets of said Dunn & Anderson, less said \$1,500 thereof.

"*Fifth.* That said plaintiffs, in pursuance of said agreement, put in jointly towards said capital stock the sum of eleven thousand eight hundred and forty-eight dollars and twenty cents in cash, to wit: said plaintiff, Albert Schulte, \$6,848.20 thereof, and plaintiff John A. Schulte, \$5,000 thereof.

"*Sixth.* That said plaintiffs never put in the balance of the fourteen thousand dollars agreed by them as aforesaid to be contributed towards said capital stock, and amounting to \$2,151.80, and they remain indebted therefor to said firm.

"*Seventh.* That on or about the first day of March, 1876, said partnership of James Anderson & Co. was dissolved by mutual consent of the members thereof.

"*Eighth.* That said firm, during the aforesaid period of its existence, made no profits, but, on the contrary thereof, did a losing business, and sunk all but a fragment of its capital, as hereinafter more particularly stated and set forth.

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"*Ninth.* That during the existence of said firm, the plaintiff, Albert Schulte, drew out from said Capital stock for his personal use, \$1,717.75

During the same time, plaintiff

John A. Schulte, drew out there-

for,	1,319.00	\$3,036.75
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Defendant during same period drew

out therefor,	2,625.28	
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Defendant since the dissolution has

collected and appropriated to

his use,	208.42	2,833.70
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Defendant has drawn out of the

firm less than plaintiffs have,

and to which he is entitled by

way of equality before the final

division of the remaining assets

of the firm,		203.05
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"*Tenth.* That at the time of the dissolution of said copartnership, the whole assets thereof (irrespective of the indebtedness of the plaintiffs thereto for the aforesaid deficiency of their capital stock) amounted nominally to the sum of, . . . \$10,372.22

Out of which has been realized only

the following sums, viz.:

Collected by plaintiffs,	\$3,662.99	
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" " defendant,	208.42	
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Isaac Newton, receiver, net,	81.07	3,952.48
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"*Eleventh.* That said firm at the time of its dissolution owed the sum of \$3,125, which sum plaintiffs have since fully paid and discharged, and said copartnership now owes no debts whatever.

"*Twelfth.* That all the assets collected by the plaintiffs as aforesaid, and amounting as aforesaid to \$3,662.99, have been kept and appropriated by them, first, to the payment of the firm debts as aforesaid, and the balance to their own use; also, that the sum

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of \$208.42, collected by defendant as aforesaid, has been appropriated by him to his own use.

"Also that the receiver herein has in his hands net assets, \$81.07

"*Thirteenth.* That the nominal value of the assets so contributed, as aforesaid, by said defendant, as and for his share of the capital stock of said firm, was \$16,169.36, but that only \$3,876.65 was ever collected or realized therefrom.

"*Fourteenth.* I further do find that the distributive balance of the assets of the said firm of J. Anderson & Co. amounts to \$2,695.16
viz. :

Collected by plaintiffs, . . .	\$3,662.99	
" " defendant, . . .	208.43	
	<hr/>	
	3,871.41	
Am't capital unpaid by plaintiffs,	2,151.80	
	<hr/>	
	6,023.21	
Deduct debts paid by plaintiffs,	3,125.00	
	<hr/>	
	2,898.21	
Amount charged to plaintiffs <i>supra</i>		
for equality,	203.05	
	<hr/>	
		2,695.16
		<hr/>
		\$2,695.16

"*Fifteenth.* That defendant, just before executing the partnership agreement, and during the negotiations which led thereto, represented to plaintiffs the said assets of Dunn & Anderson to be good and collectible, and worth then the nominal value of \$16,169.36, and plaintiffs entered into said partnership, believing and relying upon said representations ; but the greater part thereof were worthless and uncollectible, except to the amount of \$3,876.65 as aforesaid.

"*Sixteenth.* That defendant, after the execution of

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said agreement, and on the morning of the day of the commencement of the said business of the copartnership pursuant thereto, made a like representation to plaintiffs, and verbally agreed that same might be re-charged to him if not collected.

"*Seventeenth.* There is no evidence that defendant knew or believed, at the time of making said representations, the same would prove to be otherwise than he so represented.

"*Eighteenth.* There was no consideration whatever to defendant for said agreement, either of benefit to him or of loss to plaintiffs.

"*Nineteenth.* That, just prior to such dissolution, the defendant, James Anderson, verbally agreed with the plaintiffs that such of the aforesaid assets contributed by him as had proved to be worthless and uncollected, should be charged back upon the books of the firm to his private account, and the same were accordingly so charged back to him.

"*Twentieth.* There was no consideration to the defendant whatever for said agreement, whether of benefit to him or loss to plaintiffs.

"*Twenty-first.* That, shortly after said dissolution, defendant disaffirmed said agreement, and refused to be bound thereby."

And as conclusions of law, from the facts so found :

"*First.* There being no allegations of fraud or deceit in the complaint, the representations made by defendant to plaintiffs, before the formation of the partnership, were but a mere expression of his opinion of the value of the assets, and does not enter into or effect the partnership agreement afterwards executed.

"*Second.* For like reasons the similar representations of defendant, subsequently made on the day said firm commenced business, were but a like mere expres-

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sion of his opinion, and the verbal agreement that same might be recharged, if not collected, with no consideration therefor, was a mere *nudum pactum*.

"*Third.* That the subsequent verbal agreement made just prior to dissolution, authorizing said uncollected assets to be charged back to plaintiff, and being without any consideration, was also a mere *nudum pactum*. Defendant did not sufficiently long acquiesce in the so charging back of said assets to him to be bound thereby.

"*Fourth.* That the business of said firm of James Anderson & Co. has not been profitable, but, on the contrary, it has lost most of its capital, and that its entire assets amount to but the sum of \$2,695.16.

"*Fifth.* That the division of said remaining assets among the parties should be in proportion to the amount of their respective contributions to the capital stock of said firm—to wit :

To the plaintiffs,	\$2,033 63
" defendant,	661 63

"*Sixth.* That defendant is entitled in addition thereto to aforesaid sum mentioned in the ninth finding of fact, viz., . . . 203 05

"*Seventh.* That all the said residuary assets are in plaintiff's possession, none of them being in possession or control of defendant.

"*Eighth.* That the sum of \$193.70 now held by the receiver herein, should be paid over to defendant by him, less the sum of \$112.63 for his commission and charges as such receiver, and said receiver is not entitled to any other or further sum ; the balance so to be paid over by said receiver is \$81.07.

"*Ninth.* That said balance in the hands of the receiver belongs to the parties hereto, in proportion to their aforesaid contributions to the capital stock, as follows, viz.: to plaintiffs, \$58.25, to defendant, \$22.82, and that said defendant on receiving said balance shall

Appellants' Points.

credit said sum of \$58.25 on the judgment to be entered herein against plaintiffs.

"*Tenth.* That defendant is entitled to judgment against plaintiffs for the sum of \$864.68, besides costs of this action, in which costs should be taxed the charges and commissions of the receiver aforesaid."

Edward P. Wilder, attorney, and of counsel, for appellants, among other things, urged:—I. The Referee has apparently omitted to make any apportionment of the losses of the firm, or else has done it on the theory that defendant has contributed and lost \$16,169.36, the nominal value of those "assets" of the old firm of Dunn & Anderson, instead of \$3,876.65, their real value. An arithmetical calculation based upon his own "findings" will speedily demonstrate the actual loss of the firm.

Plaintiffs contributed cash,	\$11,848.20
Defendant contributed "assets" which realized, cash,	3,876.65

Total capital stock, —	\$15,724.85
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All of this, he finds, was lost and sunk "but a fragment," and he furnishes us the figures whereby to determine that fragment.

Plaintiffs, he says, drew during the co-partnership,	\$3,036.75
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Plaintiffs, he says, have collected since the dissolution \$3,662.99, from which they have paid the debts of the firm, \$3,125, leaving in their hands,	537.99
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Total saved by plaintiffs,	\$3,574.74
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Defendant, he says, drew during the copartnership,	\$2,625.28
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Defendant, he says, has collected since the dissolution,	208.42
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Total saved by defendant,	\$2,833.70
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Appellants' Points.

Besides these sums, the receiver, he says, holds in his hands, subject to proper charges, \$193.70.

These three sums, then, comprise the aggregate of the "fragment" saved from the wreck of this firm's capital, and the total loss, therefore, may be summarized as follows :

Capital invested,	\$15,724.85
Saved by plaintiffs, who are chargeable therewith,	\$3,574.74
Ditto by defendant,	2,833.70
Held by receiver (subject to charges),	193.70
	<hr/> 6,602.14

Total loss sustained by the firm, \$9,122.71

Of this loss, according to the partnership agreement, the plaintiffs shall bear one-half and defendant one-half, *i. e.*, each party shall bear \$4,561.35. In point of fact, the parties have borne the loss in the following ratios :

Plaintiffs have paid in,	\$11,848.20
" " drawn out and collected,	3,574.74

Actual loss borne by plaintiffs,	\$8,273.46
From which may be deducted the sum held by the receiver,	193.70

\$8,079.76

Defendant has paid in,	\$3,876.65
" " drawn out, &c.,	2,833.70

Actual loss borne by defend- ant,	1,042.95
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Making the total, as before, \$9,122.71

It is obvious that these losses can be equalized only by the defendant paying to the plaintiffs the difference

Appellants' Points.

between his actual loss, \$1,042.95, and the sum of \$4,561.35, which, as seen above, is his just apportionment of the firm's total loss, \$4,561.35 — \$1,042.95 = \$3,518.40. It is clear, then, that if we give plaintiffs the whole of the \$193.70 in the hands of the receiver, the plaintiffs would still be entitled to a judgment against the defendant for the sum of \$3,518.40.

III. To credit the defendant with the face value of a lot of worthless and uncollectible book accounts would be grossly unjust to the plaintiffs, who have paid in their cash. The referee apparently reconciles it by saying that defendant contributed certain "assets," whose nominal value was \$16,169.36; that his representations in regard to them were "without consideration," the mere expression of his "opinion," and that plaintiffs took them, as it were, for better or worse. But he also finds that plaintiffs entered into the co-partnership, and put in their money "believing" in his representations; also, that the defendant himself recognized their binding force upon him at the dissolution of the partnership, by agreeing that the great uncollected and worthless majority of them be charged back to his personal account; that they actually were so charged back. And yet he says all this must go for nothing, and defendant must be credited as if he had actually contributed and lost \$16,169.36. The proposition is too absurd for serious refutation. The referee himself repudiates it when called upon to divide the "remaining assets," and apportions the major part of them to the plaintiffs; whereas, to be consistent, he should have awarded the greater sum to the defendant, in the ratio of \$16,169.36 to \$11,848.20. The pittance in the hands of the receiver is again divided in the same way.

IV. The articles provide that plaintiffs and defendant shall share equally the losses. Now, what are the losses of this firm? Clearly, it cannot have lost what

Appellants' Points.

it never had. Those uncollected accounts of the old firm of Dunn & Anderson were, and still remain, mere claims, choses in action—blank paper. Defendant, when he transferred them to the books of the new firm, agreed to take them back if not collected, and he took them back. The new firm never had the money represented by them. It never “lost” that money. It was not sunk in any business or venture of the firm. Whether there was “consideration” or not for defendant’s agreement that his worthless contribution to the capital stock of the firm be charged back to him, that it was so charged back is an accomplished fact on the referee’s findings. To the extent to which he took back his contribution, he withdrew his capital, and the capital so withdrawn by the consent of all the partners cannot be deemed a “loss” incurred in the business of the firm. The firm simply did not acquire that money.

V. We have another basis for ascertaining the loss sustained by the firm :

(a) Plaintiffs have drawn for their use,	\$3,036.75
Defendant has drawn for his use,	2,625.28
Plaintiffs’s overdraft, therefore,	= \$836.75
Defendant’s overdraft, therefore,	= 425.28

Owed to the firm, therefore, by
the parties, . . . \$1,262.03

(b) In the next place, the moneys of the firm collected by the parties since its dissolution, constitute a part of its “assets.” Defendant has collected \$208.42. Plaintiffs have collected \$3,662.99, from which they have paid out all the debts of the firm, \$3,125.

Leaving in plaintiffs’ hands,	\$537.99
“ in defendant’s hands,	208.42
“ in hands of receiver,	193.70 — \$940.11

To which add the over-drafts (<i>supra</i>),	1,262.03
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Total remaining assets of the firm,	\$2,202.14
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Respondent's Points.

NOW.

Capital cash contributed by plaintiffs,	\$11,848.20
Capital "assets" contributed by defendant,	3,876.65
Total investment,	\$15,724.85
Drawn legitimately by plaintiffs,	\$2,200.00
Drawn legitimately by defendant,	2,200.00
Present assets (including overdrafts, collections, &c.,)	2,202.14 6,602.14

Actual loss of the firm, \$9,122.71

Thus verifying the conclusion reached (*supra*) in Point I. The reasoning there pursued sufficiently demonstrates that plaintiffs are entitled to judgment against defendant for \$3,518.40. This result, it will be remembered (Point I, *supra*) was reached by assuming that all of the money held by Isaac Newton, the receiver, should be paid to plaintiffs, and their actual loss was, in the calculation, diminished by said sum of \$193.70. Whatever remains, therefore, of this sum, after allowing the proper charges of the receiver, should be ordered to be paid by him to the plaintiffs.

L. B. Bunnell, attorney, and of counsel, for respondent, urged:—I. The theory adopted by the referee was correct. There can be no pretense that the articles of agreement do not express the intention of the parties. Representations made before they were executed cannot avail to change the agreement, nor could subsequent acts, unless acquiesced in sufficiently long to amount to an intention to change its terms. "A written agreement cannot be enlarged or altered in its operation, by evidence of other prior oral

Respondent's Points.

agreements, in consummation of which the written agreement is alleged to be erroneously or deficiently executed" (Peet v. Cowenhoven, 14 *Abb. Pr.* 56). "When the terms of an instrument are plain and unambiguous, the intention of the parties is to be learned therefrom" (Westcott v. Thompson, 18 *N. Y.* 363). "The rights of the parties must in general be determined by the language of the contract" (Newton v. Woodruff, 2 *N. Y.* 153). "The intention of the parties is to be ascertained, except in cases of latent ambiguity, by a development of the circumstances under which the instrument was made" (Reynolds v. Commercial Fire-Ins. Co., 47 *N. Y.* 597). The referee had the parties before him, heard all the circumstances in detail under which the agreement was executed, and has found, as matter of fact, that the agreement clearly expresses the intention of the parties. The appellants concede that the referee found correctly as to the facts. So far as the written contract is clear, either in particular words or upon a consideration of its legal effect, no evidence extrinsic of the writing, can be received to contradict or explain its meaning (1 *Cow. & H. Notes to Phill. on Ev.* 468, 470). Evidence of declarations made at the time of executing an instrument to show that the instrument was executed upon a condition not expressed therein, is incompetent (Van Bocklin v. Tyler, 62 *N. Y.* 105). Representations made before the agreement was made are immaterial (*Ib.*). The referee was therefore right in disregarding testimony tending to show that the parties contemplated something not expressed in the agreement. In respect to the representations made after the agreement was executed, there are still weightier reasons for disregarding them. Anderson's verbal agreement to assume the payment of the uncollected accounts, and allow them to be charged to his private account, could not avail to alter or change the

Respondent's Points.

articles of copartnership or the relation of the parties to each other, for ; 1. It was not in writing. 2. After the old assets of Dunn & Anderson had become part and parcel of the capital of James Anderson & Co., they did not belong to Anderson, but to his firm, and such an agreement would be, in effect, an undertaking to pay the debt of a third person, and hence void under the statute of frauds. 3. It was without consideration. The mistake under which the learned counsel for the plaintiffs has all the while labored, is in assuming that Anderson's capital was represented by dollars and cents instead of property. It was not cash, and never so considered. It was to the capital stock what any other property would have been which belonged to the firm, but was lost or destroyed by fire, or had otherwise become inconvertible into cash. As it was, he contributed it as his share of the capital stock. It was not his fault that so small an amount was realized therefrom. The loss, from whatever cause, was a firm loss, and must be treated as such. Now the articles of agreement provide, that after payment of the debts the assets remaining shall be divided—one-half to the defendant, and one-half to the plaintiffs. reference being had to the capital actually contributed. We have then, as found by the referee, the following data from which to determine what each partner shall receive.

1. Partners were to contribute capital in full, to wit: the defendant agreed to contribute old assets and plaintiffs agreed to contribute \$14,000.

2. Defendant contributed all.

Plaintiffs contributed only,	\$11,848.20
Amount realized from old assets,	3,876.75

3. Plaintiffs drew out, . . .	3,036.75
Defendant drew out, . . .	2,625.28

4. Plaintiffs collected, . . .	3,662.99
Defendant collected, . . .	208.42

Respondent's Points.

With these data the referee makes distribution.

This brings us to the second question.

II. Admitting that the articles of copartnership require the referee to take the amount realized from the old assets as one of the data for computation, instead of one-half the entire capital, the referee was right in the mode of distribution, for we have now the amount of capital contributed in actual cash by plaintiffs, \$11,848.20, and by defendant, \$3,876.75, making a total capital of \$15,724.95.

Now we have,

1. By the terms of the partnership, profits were to be divided equally. There were no profits.

2. Partners were to pay contributions to capital stock in full.

Plaintiffs did not by \$2,151.80.

They were, therefore, indebted to the firm in that sum.

3. Plaintiffs collected, or had of the assets at dissolution,

	\$3,662.99
The defendant had,	208.42

\$3,871.41

The plaintiffs paid debts,	3,125.00
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\$746.41

Add unpaid capital,	2,151.80
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\$2,898.21

4. Plaintiffs drew out, \$3,063.75

Defendant drew out,	\$2,625.28
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Collected since,	208.42	2,833.70
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Plaintiffs' overdrafts,	\$203.05
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5. To equalize the parties, give the defendant \$203.05. That is to say, take from the assets \$2,898.21, that sum, and we have \$2,695.16, which is the sum to be distributed.

Opinion of the Court, by SEDGWICK, J.

The matter is now one simply of proportion: \$15,742.95 : \$11,848.20 :: \$2,695.16 : \$2,033.53, plaintiffs' share.

\$15,724.95 : \$3,876.75 :: \$2,695.16 : \$661.63, defendant's share.

In the same way the amount in the hands of the receiver gives, for plaintiffs' share, \$58.25; defendant's share, \$22.82. Except as to these amounts, the assets were in the hands of the plaintiffs. In order to get the assets actually on hand, the overdrafts of the plaintiffs, which were given to Anderson to make his drafts equal to the plaintiffs', are taken out, to wit, \$203.05. But this was only constructively given to Anderson; and in order to reach the sum he ought to receive, we must add it to the sum found above, \$661.63. This gives us \$864.68. The judgment should be affirmed.

BY THE COURT.—SEDGWICK, J.—The agreement of the parties states, specifically, their obligations and their interests in the capital and profits.

The plaintiffs were bound to contribute \$14,000 in cash to the capital. The defendant was bound to put in "all the assets of the firm of Dunn & Anderson represented on the books of said firm, as bills due, or to become due, except the sum of \$1,500." Assuming that the defendant was not bound to make the real value of these assets equal to their nominal value, the agreement, after providing that profits and losses were to be shared and borne equally, has the reasonable and equitable provision that at the "end, or other sooner termination of their copartnership," the copartners will make a final account, and all and every the stock, and stocks, as well as the gains and increase thereof, which shall appear to be remaining, either in money, &c., debts or otherwise, shall be divided between them, to each his proper and respective proportion, reference

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being had to the capital stock put in and invested by the respective parties."

It is seen, at once, that Anderson, not having invested as much as the Schultes, inasmuch as his contribution proved to be of the value of only \$3,876.65, while they had contributed \$11,848.90, it was their right and interest to have the accounting include, as assets, all that had been drawn out for the personal use of the partners above what they were entitled to draw out. What was properly drawn out was to be equally shared by the parties, while, if what was improperly drawn out was returned, as it should be, to the firm, the plaintiffs would be interested in it, to a far greater extent than the defendant.

The referee proceeded upon the position that the respective proportions of interest in the assets at dissolution, were represented by \$11,848.20, the cash put in by plaintiff, and \$3,876.75, the cash value of the assets put in by the defendants. I think this was erroneous in making the proportion of the plaintiff too small. For, the assets were increased by charging the plaintiffs with the amount of their capital which they had failed to contribute as they agreed. That is, the assets were supposed to include this amount, viz. : \$2,151.80. It was in effect proposed to consider it as cash. If the plaintiffs had to bear this burden, they could not be deprived of the advantage of its being part of capital contributed by them. And then, the proportion would be as \$14,000 is to \$3,876.75.

Again, I think there was a mistake in the mode of ascertaining the assets.

In the course of the business, as is stated above, the plaintiffs and defendant had drawn from the firm more money than was allowed by the partnership articles.

The plaintiffs had drawn,	\$3,036.75
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The defendants had drawn,	2,625.28
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The referee finds that it was the right of the defend-

Opinion of the Court, by SEDGWICK, J.

ants to draw from the estimated assets, \$203.05, to equalize the amount drawn by him and the amount drawn by plaintiffs, and afterwards, at the end of the accounting, the plaintiffs were held liable to pay the whole of this \$203.05. I think there were two errors.

1st. The defendant was not entitled to draw from the assets this sum, because he was entitled to have only the proportion; this has been already stated. 2d. There is no provision of the articles that permit him to draw any amount for the purpose of equalizing his drafts with plaintiffs. Each was entitled to draw but \$50 a week for the forty-four weeks they were in business—that is, \$2,200. All above that sum should have remained undrawn, and the plaintiffs should return to the assets, \$836.75
And the defendant also, 425.28

The assets should, in view of the referee, be increased by the amount of the capital which plaintiffs should, but had not contributed, viz., 2,151.86

The plaintiffs had in their possession money collected by them, 537.99
The defendants, 208.44
Cash in receiver's hands, 81.07

The sum total should be divided according to the proportions in which each was entitled to share in the assets, and that result would show what each had the right to have. If one had received an amount of the assets actually, which, with any sum they had not paid to the firm, but should have, would exceed the amount they were entitled to, out of the assets, the excess should be paid to the other party, and this excess would be the correct amount of the judgment.

So far, no attention has been paid to the effect upon the result of a correct application of the provisions of the articles, that provided that the loss should be borne equally. As soon as a loss occurred, the only way

Statement of the Case.

that each could actually bear it equally, would be to pay one half of its amount back into the firm, or, in case it was not paid, to be charged with the one-half, in his individual account, and then, at a later time, to perform the obligation expressed by such a charge. This not having been done before the close of business and the final accounting, these charges in gross, viz., the whole of the losses, should be treated as the plaintiffs' deficiency of capital was treated, and should increase what was called the assets of the firm, exactly the same as if third persons had promised to bear the losses, and the assets so increased should be divided in the proportions above specified, and each party should then be considered as having already received on account of his share the amount he had omitted to pay over, under his obligation to share equally the losses, *i. e.*, one-half of the losses.

The result of this would be so different from the result of the accounting below, that there should be a new trial and a new accounting, with costs to the plaintiff to abide the event of the accounting.

Judgment reversed.

SPEIR and FREEDMAN, JJ., concurred.

WALTER STRUSBURGH, PLAINTIFF AND APPELLANT, *v.* THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, DEFENDANTS AND RESPONDENTS.

ASSESSMENTS—ASSESSORS, JURISDICTION OF—CHARACTER OF THEIR ACTS, AND HOW THE SAME MAY BE REVIEWED.

Assessors, having jurisdiction, act judicially in fixing the amount to be imposed upon the property benefited, and such an assessment is in fact a judgment.

Statement of the Case.

Such an assessment may be reviewed :

1. By the body or board who laid the same, upon a hearing of objections made thereto;
2. By the court on certiorari; and,
3. By the court, on petition, in certain cases in the city of New York, for fraud or irregularity under *Laws of 1858, c. 338*.

Such an assessment cannot be questioned in a collateral action. As long as it stands unreversed or unvacated, money collected under it, by the defendant, cannot be recovered back by action of the party against whom the assessment was made, and by whom it was paid (*Swift v. City of Poughkeepsie, 37 N. Y. 511*).

In the following cases, action for recovery, &c., was brought after the assessment was vacated, or it was declared absolutely void for want of jurisdiction, in the action brought for such recovery: *Bank of Commonwealth v. Mayor, &c., 43 N. Y. 184*; *Peyser v. Mayor, &c., 70 Id. 497*; *Newman v. Supervisors of Livingston Co., 45 Id. 876*; *Chapman v. City of Brooklyn, 40 Id. 372*.

In the case at bar, the complaint fails to show that the judgment recovered by the defendant against the contractor H. (for overpayment beyond the contract price), declared or made the assessment invalid, but that it determined simply the fact of overpayment to H. and defendant's right to recover the sum overpaid. Such a judgment furnishes a reason or ground for the reduction of the assessment upon a proper application, but is not tantamount to a reversal or vacation of the assessment.

Had the complaint further alleged that the judgment of the defendant against the contractor, H., had been collected, or that the latter was solvent, and the judgment was collectible, and that it remains uncollected through the fault of the defendant, this action (under the doctrine of *Eno v. Mayor, &c., 68 N. Y. 214*), could perhaps, to some extent, be sustained, upon the equity arising upon the right of the plaintiff to share in the fund collected, or to be collected; but in the absence of any such allegation, the complaint is clearly defective in not stating a cause of action.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal from judgment sustaining demurrer to plaintiff's complaint.

Statement of the Case.

The facts alleged in the complaint are :

1. That the defendants have become liable to respond for all the debts and liabilities of the town of Morrisania.

2. That the plaintiff owned in fee certain lands in said town at all the dates hereinafter named.

3. That on September 17, 1872, the Board of Trustees of Morrisania confirmed an assessment for grading Willis avenue, of an aggregate amount of \$20,348.75, of which the land of the plaintiff was assessed \$3,092.00.

4. That the assessment was valid on its face.

5. That the assessment was illegal, because the contractor had been overpaid beyond the contract price of the work done, to the amount of \$6,666.50, through the negligence or carelessness of said trustees.

6. That on July 2, 1873, the said trustees commenced an action against the contractor to recover back the sum of money overpaid to him, and the defendants having been substituted as plaintiffs in that action, they subsequently recovered judgment therein on November 17, 1876, in the sum of \$6,076.42.

7. That on October 15, 1872, the plaintiff paid the assessment of \$3,092.

8. That such payment included \$1,030.60 of the overcharge for the overpayment to the contractor.

Plaintiff demands judgment in this action, declaring such assessment invalid to the extent of such overpayment, and reducing the same by deducting such amount, and for judgment in his favor for the sum of \$1,030.60, being plaintiff's proportionate share thereof.

The defendants demur upon the ground that no cause of action is alleged.

The demurrer was sustained, and plaintiff appealed.

Alexander B. Johnson, for appellant.

Opinion of the Court, by FREEDMAN, J.

William C. Whitney, counsel to the corporation, and *D. J. Dean*, of counsel, for respondents.

BY THE COURT.—FREEDMAN, J.—The specific reason for which the plaintiff in his complaint claims that the assessment, as made, is illegal and void, do not negative the jurisdiction of the assessor to assess plaintiff's property for a proper proportion of the expense of the improvement. On the contrary, their jurisdiction is impliedly admitted. The case, therefore, falls within the well settled rule that assessors, having jurisdiction, act judicially in fixing the amount of the assessment to be imposed upon the property deemed benefited, and that such an assessment is in effect a judgment. Such an assessment may be reviewed :

1. By the body or board that made the assessment upon a hearing of objections thereto ;
2. By the court, on certiorari ; and,
3. In certain cases in the city of New York, by the court for fraud or irregularity on petition under chapter 338 of *Laws of 1858*.

But in a collateral action, such an assignment cannot be questioned, and as long as it stands unreversed or vacated, money collected under it, can no more be recovered back by action, than can a suit be sustained and money recovered which has been collected upon the erroneous judgment of any court of competent jurisdiction (*Swift v. Poughkeepsie*, 37 *N. Y.* 511.)

In *Bank of Commonwealth v. Mayor, &c.* (43 *N. Y.* 184) judgment vacating the tax was obtained upon certiorari before the action for the recovery of the money was instituted.

In *Peyser v. Mayor, &c.* (70 *N. Y.* 497) the plaintiff first reversed and vacated the assessment in a direct proceeding, by petition under the act of 1858, and then brought his action.

Newman v. Supervisors of Livingston Co. (45 *N. Y.*

Opinion of the Court, by FREEDMAN, J.

676) and Chapman v. City of Brooklyn (40 *Id.* 372), do not establish a contrary doctrine. In both these cases the action was sustained upon the ground that the assessment proceedings were absolutely void for want of jurisdiction.

In the case at bar the complaint, even upon the most liberal construction, fails to show that the judgment recovered by the defendant's against Handibode, the contractor, declared or made the assessment invalid. That judgment determined, as between the parties, simply the fact of overpayment, and defendant's right to recover the sum overpaid, and such determination furnishes a reason or ground for a reduction of the assesment upon a proper application, but is not tantamount to a reversal or vacation of the assessment. This being so, the action as brought does not lie.

If the complaint alleged, in addition to the matters set forth, that the judgment against Handibode has been collected, or that he is solvent and the judgment collectible, and that it remains uncollected through the fault of the defendants, the action, under the doctrine of *Eno v. Mayor* (68 *N. Y.* 214), could perhaps to some extent be sustained, upon the equity arising upon the prospective right of the plaintiff to share in the fund collected, or be collected, but in the absence of any such averment the case clearly falls within the general rule above stated.

The judgment should be affirmed with costs.

CURTIS, Ch. J., concurred.

Opinion of the Court, by FREEDMAN, J.

BENJAMIN L. LUDINGTON, PLAINTIFF AND APPELLANT,
v. AMOS C. BELL, IMPEADED, &C.,
DEFENDANT AND RESPONDENT.

DISCONTINUANCE OF ACTION.

When the court will permit a plaintiff to discontinue without costs.

Where a defendant pending the action has obtained a discharge of his debts for insolvency, or in bankruptcy, this court, in the exercise of its discretionary power, will permit the plaintiff to discontinue without costs; but where the plaintiff, knowing of the defendant's discharge, nevertheless goes on with the action, he will be required to pay costs on a discontinuance (See cases cited in the opinion of the court).

The plaintiff in such cases must come to the court, upon all the facts disclosed, and it must appear equitable and just that he should be relieved. If it conclusively appears that he never had a cause of action, the case does not fall within the general rule, unless the plaintiff also shows that he was misled, by appearances created by defendant, into bringing the action.

In the case at bar, the application for leave to discontinue the action without costs does not commend itself to the favorable consideration and discretion of the court.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal from order denying plaintiff's motion for leave to discontinue action without costs.

Martin Conway, attorney, for appellant; *Lucien Birdseye*, of counsel.

H. T. Cleveland, attorney, for respondent; *E. H. Benn*, of counsel.

BY THE COURT.—FREEDMAN, J.—As a general rule, when a defendant, pending the action, obtains an

Opinion of the Court, by FREEDMAN, J.

solvent's discharge, or a discharge in bankruptcy, the court, in the exercise of its discretionary power, will permit the plaintiff to discontinue without costs (*Hart v. Story*, 1 *Johns.* 148; *Merchants' Bank v. Moore*, 2 *Id.* 294; *Case v. Belknap*, 5 *Cow.* 422; *Labron v. Woram*, 5 *Hill*, 373).

But where the plaintiff, knowing of the defendant's discharge, nevertheless goes on with the suit, he will be required, if he afterwards discontinue, to pay the costs to which the defendant was subjected after the discharge (*Ludlow v. Hackett*, 18 *Johns.* 252; *Merritt v. Arden*, 1 *Wend.* 91; *St. John v. Hart*, 16 *How. Pr.* 192).

In granting the motion for leave to discontinue without costs, the court does not proceed on the idea that the defendant may defeat the plaintiff by pleading his discharge, but on his plain inability to pay, evidenced by the discharge, on account of insolvency or bankruptcy, the debt which otherwise he would be bound to pay (*Honeywell v. Burns*, 8 *Cow.* 121).

But the plaintiff must come with good grace, and upon all the facts disclosed it must appear to be equitable and just that he should be thus relieved, or the court will not interfere. If it conclusively appears that he never had a cause of action, the case does not fall within the rule, unless he shows that he was misled by appearances, created by the defendant, into bringing the action.

In the case at bar the defendants, Amos C. Bell and Jared W. Bell, were partners. As such partners they gave the plaintiff their promissory note for \$4,000. Afterwards they dissolved partnership. After the dissolution the plaintiff agreed with Amos C. Bell that if the latter would pay one-half of the note, he should be entirely released and discharged. Amos C. Bell did so, paying part in cash and giving his notes for the balance, which he afterwards paid. The plaintiff then,

•• Opinion of the Court, by FREEDMAN, J.

in violation of his agreement, sued him jointly with the other partner to recover the balance of the firm's indebtedness. The court of appeals decided that the individual notes of Amos C. Bell, so given, constituted additional security; that their execution and delivery conferred an advantage and benefit upon the plaintiff, constituting a sufficient consideration for the agreement; that the agreement was valid and legal, independently of the act of 1838 relating to compromises by partners and joint debtors; and that, in view of the existence of a new and sufficient consideration in fact, the rule that a release of one of several joint debtors must be under seal had no application to the case. This decision conclusively establishes that, upon the facts as they have been disclosed, and which were well known to the plaintiff before the commencement of the action, the plaintiff should never have brought the action. The court of appeals also awarded costs to Amos C. Bell to abide the event.

On the motion below, this state of facts was not changed. It appeared, however, in addition, that the petition of Amos C. Bell in bankruptcy was filed December 1, 1877; that on February 17, 1879, the plaintiff and all the creditors of the said Bell were notified that the application for a discharge would be heard March 2, 1879, and that on April 1, 1879, the discharge was granted. The appeal to the court of appeals was perfected in March, 1878, by the giving of an undertaking executed by Thomas H. Greer, as one of the sureties, and while the appeal and the bankruptcy proceedings were pending, Thomas H. Greer purchased the judgment against Bell from the plaintiff, and indemnified the plaintiff, and employed a new attorney, and through him opposed the appeal of his principal. The plaintiff had claimed that his claim against Bell was secured by a former assignment and was not affected by the proceedings in bankruptcy,

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and he evidently expected to be successful in the court of appeals and have the benefit of the security on the appeal. Greer, when he became the purchaser, acted upon the same idea with the view of fastening a liability upon his co-surety.

The appeal in the court of appeals was argued on both sides, April 7, 1879, and the decision rendered April 25, 1879. After the remittitur had been filed, Greer, in the name of the plaintiff, made the motion for leave to discontinue without costs. Messrs. Birdseye, Cloyd and Bayliss, who acted as attorneys for Greer on that motion, had been the attorneys for Amos C. Bell on his application for a discharge in bankruptcy, and they had also been the attorneys and counsel for Greer in proceedings taken against him by the plaintiff during the pendency of Bell's proceedings in bankruptcy, and under their advice Greer purchased plaintiffs' claim.

It therefore appearing, not only that the action was originally brought on a claim which had no existence, and that Amos C. Bell is not responsible, by the creation of false appearances, for the bringing of it, but also that the plaintiff has no further interest in the claim, and that Greer purchased it on a speculation and with knowledge of at least the pendency of Bell's application for a discharge, and upon, as must be assumed, a calculation of the apparent chances in his favor, the application for leave to discontinue without costs does not commend itself to the favorable consideration of the court.

The order appealed from should be affirmed with costs.

CURTIS, Ch. J., concurred.

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PATRICK BANNON, PLAINTIFF AND APPELLANT,
v. ANNA McGRANE, EXECUTRIX, AND WIL-
LIAM F. NEALIS, EXECUTOR, &C., DEFEND-
ANTS AND RESPONDENTS.

“EXECUTOR,” &C., ADDED TO NAME OF PARTY—MAY BE TREATED AS SURPLUSAGE, WHEN.—VERDICT, MOTION TO SET ASIDE, AS AGAINST THE WEIGHT OF EVIDENCE.

Adding the word “executor,” &c., or “executors,” &c., to the name of parties to an action, may be treated as mere *descriptio personæ* and surplusage, when nothing appears in the summons or complaint indicating the intention of the plaintiff to charge defendants in their representative capacity.

The reversal of an order of a trial judge, setting aside a verdict as against the weight of evidence, by an appellate court, is a matter of grave importance. Such motions are not governed by any well defined rules, but depend, in a great degree, upon the peculiar circumstances of each case. They are addressed to the sound discretion of the judge or court, and whether they should be granted or refused involves the inquiry and consideration, in each case, as to whether substantial justice has been done or not. The decision is one particularly for the judge before whom the trial was had and who heard the testimony and saw the witnesses on the stand; and where the decision has been reached after full deliberation and due judicial discretion, it should be confirmed.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal from order setting aside a verdict for \$8,255.60 in favor of the plaintiff against the defendant, and granting a new trial. The motion for a new trial was made on the judge's minutes, upon exceptions taken during the trial, and on the ground that the verdict was contrary to the evidence, and the damages excessive.

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The action was brought to recover the sum of \$6,255.60, and interest, under an alleged contract, made with the defendants, to complete the filling-in, grading and finishing of the Fifth avenue, in the city of New York, between Eighty-sixth street and Mount Morris Square. A contract had been made between one John McGrane and the Mayor, Aldermen and Commonalty of the city of New York, for that work. John McGrane died before completing the contract. The contract in this suit was made for the completion within a specified time of the work left unfinished by John McGrane, deceased. The plaintiff made about six thousand four hundred cubic yards of filling, and then abandoned the work, leaving several thousand cubic yards more to be done.

L. Laftin Kellogg, for appellant.

Alphonso H. Alker, for respondents.

BY THE COURT.—FREEDMAN, J.—The contract with the plaintiff having been made after the death of the testator, plaintiffs' cause of action is against the executors personally, and not against the estate (*Austin v. Munro*, 47 N. Y. 360 ; *Ferrin v. Myrick*, 41 N. Y. 315). There is nothing in the title of the summons or complaint to justify a claim against the defendants in their representative capacity. They are described "executrix" and "executor." Without the word "as" prefixed, the words thus used are a mere description of the persons.

Nor is there anything in the body of the complaint charging the defendants in their representative capacity. True, the will is set out, and the appointment of the defendants as executrix and executor, and it is apparent that the pleader deemed these allegations relevant and material. But their insertion detracts nothing from the subsequent plain count against the

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defendants individually, and consequently they may be treated as surplusage.

If the case was advanced on the calendar, on the ground that it was an action against the defendants in their representative capacity, and for that reason entitled to a preference, it should, the moment the fact appeared to be otherwise, have been relegated back to its proper place by the trial judge. But that this was not done, does not constitute a circumstance to be taken into account in the consideration of the present appeal.

The question, therefore, remains, whether, upon the main issue, the verdict was properly set aside. That related to the terms of the agreement between the plaintiff and the defendants. The plaintiff contended that he was to be paid fifty per cent. of the price of the work performed by him, as often as the city surveyor handed in a certificate or estimate of the work done. The defendants claimed that he was not to be entitled to any pay until the whole of the work was entirely completed by him, and the defendants had obtained their payment from the city.

Upon this issue there was testimony given on both sides, which was conflicting. The defendants' version, however, stood corroborated by a receipt given by the plaintiff in acknowledgment of a sum of money claimed by the defendants to have been paid to him as an advance, in which he expressly agreed that such advance should not conflict with the agreement as made, according to which he was to be paid "after the said work is completed as aforesaid, and as soon, and immediately after the payment of the amount due, or to grow due, under the said contract of John McGrane, deceased, and the corporation of the city of New York, by the said corporation to said executrix or executor, or to the holders or assignees of said contract."

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At the close of plaintiff's testimony, and again at the close of the whole case, the defendant moved for a dismissal of the complaint, and in each instance excepted to the refusal to dismiss, and on the rendition of the verdict he moved for a new trial upon the facts and the law of the case. The court accorded to the counsel on both sides an opportunity at a later day in the term to argue all the questions involved, which they availed themselves of, and after due deliberation the court came to the conclusion that the verdict should be set aside.

Upon this state of facts it is difficult to see how the order can be disturbed. It is at all times a grave question for an appellate court to reverse, on the ground of error, an order made by the trial judge setting aside the verdict as against the weight of evidence. Motions to set aside verdicts, as against the weight of evidence, are not governed by any well defined rules, but depend in a great degree upon the peculiar circumstances of each case. They are addressed to the sound discretion of the court, and whether they should be granted or refused involves the inquiry, in each particular case, whether substantial justice has been done, the court having in view solely the attainment of that end.

In the present case the learned judge below proceeded with more than usual deliberation, and the real ground for his decision was stated by his decision as follows, viz.:

"After looking over the testimony I am of the opinion that injustice would be done to allow the verdict to stand. It is difficult to believe that the plaintiff could have read the receipt for \$1,500 without reading the terms written in connection with and in continuation of the receipt itself.

"It is not pretended that the plaintiff was deceived or in any way entrapped into signing his name to the

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whole paper, which sufficiently appears to have been read over to him, and which had been read by him, as it was his duty to do when he had it in his hands to read. The only excuse given was, that he had not his glasses, and if anything, that he was not a good reader, not that he could not read. There must be a new trial."

Upon the facts as they appear, the conclusion reached was one which the judge, who not only had heard the testimony, but also had observed the manner and behavior of the witnesses upon the stand, had a right to reach, and it, therefore, should be sustained.

The order appealed from should be affirmed with costs.

CURTIS, Ch. J., concurred.

HORACE B. CLAFLIN, ET AL., PLAINTIFFS AND RESPONDENTS, v. JOHN F. MAGUIRE, ET AL., DEFENDANTS AND APPELLANTS.

EQUITY, AMONG JUDGMENT CREDITORS OF INSOLVENTS.—MODIFICATION OF JUDGMENT ON APPEAL.

Courts of equity are accustomed to relieve judgment creditors, against impediments fraudulently or inequitably interposed against their legal remedies.

Wherever superior equities exist, and are established in favor of one judgment creditor or a class of creditors against other judgment creditors, or against the property of their common debtors, court of equity have full jurisdiction in the premises, to adjudicate upon and enforce the same, by judgment in reference thereto.

A judgment of this character may be modified by the appellate court in accordance with its views of such equities, without costs to either party.

Opinion of the Court, by FREEDMAN, J.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal from judgment, entered upon the decision of the court at special term, and from an order denying motion for new trial upon the judge's minutes.

T. J. McKee, and *M. Compton*, for appellant Maguire.

Henry Thompson, and *Charles W. Gould*, for respondents.

BY THE COURT.—FREEDMAN, J.—In connection with the exemplified copy of the execution, returned *nulla bona* in the marine court action of *Clafin v. Maguire*, which may be considered upon the present appeal as incontrovertible record evidence, the evidence adduced at the trial amply justifies the findings of fact made by the learned judge below, and the findings so made fully sustain the conclusions of law based thereon, with a single exception which will be presently noticed. The case falls within the principle on which courts of equity are accustomed to relieve a judgment creditor against impediments fraudulently or inequitably interposed against his legal remedy. No error appears to have been committed in the reception of evidence. The only error which appears, is the conclusion under which a personal judgment is directed against both defendants, not only for the costs of the action, but for plaintiffs' entire claim with interest and costs, and the incorporation of a provision to this effect, in the direction for the entry of judgment, and in the judgment as entered. The plaintiffs cannot have, in addition to the equitable relief awarded to them, and the direction to the sheriff to apply the moneys in his hands to the satisfaction of their just claim, with interest and costs,—a personal judgment against the

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defendants, enforceable by execution against, them beyond the costs of the action. They already have judgment in the marine court against Maguire, which is the foundation of the present action.

Another well founded suggestion is that the judgment appealed from should, in form, provide that the judgment and execution in the marine court action of *Maguire v. Maguire* be vacated and set aside as against the plaintiffs only.

But the error and suggestion referred to do not call for a reversal, but only a modification of the judgment.

The judgment should be modified in accordance with the views above expressed, and, as thus modified, affirmed without costs to either side on this appeal.

CURTIS, Ch. J., concurred.

NOTE.—The following case reported under the same head notes.
—REPORTERS.

ANTON HEIM, PLAINTIFF AND RESPONDENT, v.
JAMES S. DAVENPORT, ET AL., DEFENDANTS
AND APPELLANTS.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal from judgment.

S. E. Church, for appellant.

D. M. Porter, for respondent.

BY THE COURT.—FREEDMAN, J.—This case presents a contention between creditors of the insolvent firm of Davenport & Co., for the proceeds of goods of the firm sold on execution by James S. Davenport.

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It is quite plain that the plaintiff originally commenced the action as a judgment and execution creditor, upon the theory that the judgment of James I. Davenport was fraudulent, and without consideration, and the result of a scheme between him and the other defendants to possess himself wrongfully of the property of the firm. This is the *gravamen* of the complaint.

Upon the trial the plaintiff failed to prove any such case. But the facts developed, for the reasons stated by the learned judge below, established an equity in favor of the plaintiff to the property in question, superior to that of James I. Davenport, and on that account the plaintiff made out a case against the latter. Upon full consideration I can, upon the questions which appear to have been raised, find no ground for a reversal of the judgment as against James S. Davenport.

On the other hand, I fail to see how the judgment appealed from can be sustained in its present form, as to the defendants, James B. Davenport and James Grant, constituting the firm of Davenport & Co. It stands against them, as it does against James I. Davenport, as a simple money judgment, and as such it is enforceable by execution against them directly. But the plaintiff has already recovered such a judgment against them in the marine court, which was made the basis for the present action. Nor is there anything in the facts of the case which calls for a duplication of it. Their names seem to have been included because they omitted to call, by some appropriate motion, the attention of the trial judge to the fact that they were not necessary parties to the cause of action remaining against James I. Davenport.

Under all the circumstances, and especially as the three defendants have throughout appeared by the same attorney, the most equitable disposition that can be made of the present appeal is as follows, viz. :

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The judgment should be modified so as to adjudge and decree a priority of judgment and execution in favor of the plaintiff as against the defendant James I. Davenport, and that the plaintiff recover judgment against said James I. Davenport for the sum of \$449.85, principal and interest, and costs and disbursements, taxed at \$147.65, amounting in the aggregate to the sum of \$597.50, and as thus modified, the judgment should stand affirmed against all the defendants, without costs to either side, on this appeal.

CURTIS, Ch. J., concurred.

WILLIAM S. VERPLANCK, AS RECEIVER, &C.,
PLAINTIFF AND RESPONDENT, v. MARCUS KENDALL,
DEFENDANT AND APPELLANT.

REFERENCE.

Issues in an action for damages for fraud and deceit cannot be referred for hearing and determination without consent of parties. But when the complaint sets forth an action on a contract, and it appears that the trial thereof involves the examination of a long account, the defendant cannot defeat a reference by a tender of an issue of fraud in the transaction, and a claim for damages therein, in the way of recoupment or counter-claim.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal from an order referring the issues to a referee to hear and determine the same.

Alvin Burt, for appellant.

William W. Badger, for respondent.

BY THE COURT.—FREEDMAN, J.—This action, as

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pleaded, is for the recovery of damages for fraud and deceit. Tort being the whole groundwork of the action, it is settled that the defendant has a constitutional right of trial by jury, of which neither the court nor any statute can deprive him, and that it is no answer to his claim of such a trial to say that the plaintiff may fall back upon an implied promise (*Townsend v. Hendricks*, 40 *How. Pr.* 143, reversing S. C., 32 *N. Y. Super. Ct.* [2 *Sweeny*] 503).

The same right exists in an action to recover unliquidated damages for the breach of a contract (*Ross v. Combes*, 37 *N. Y. Super. Ct.* [5 *J. & S.*] 289).

The character of the action is determined by the complaint, and it is only when the complaint sets forth an action on contract which is shown to involve the examination of a long account, that the defendant cannot defeat a reference by a tender of an issue of fraud in the transaction, and claiming damages by way of recoupment or counter-claim (*Welsh v. Darragh*, 52 *N. Y.* 590; *Patterson v. Stettauer*, 39 *N. Y. Super. Ct.* [7 *J. & S.*] 413).

The order should be reversed, with costs.

CURTIS, Ch. J., concurred.

CHARLOTTE ANN NICOLL, ET AL., EXECUTORS,
&C., PLAINTIFFS, v. EDWARD BURKE, DEFENDANT.

COURT OF APPEALS, JUDGMENT OF.

Where the court of appeals reverses the judgment of the court below, unless the plaintiff stipulates to deduct therefrom certain amounts with interest, &c., but does not direct that plaintiffs' costs on appeal to the general term be waived or deducted, this court will not modify the judgment by any change of the conditions therein.

Opinion of the Court, by FREEDMAN, J.

Before SEDGWICK and FREEDMAN, JJ.

Decided December 1, 1879.

Motion at general term to modify the judgment, as entered on the remittitur from the court of appeals.

BY THE COURT.—FREEDMAN, J.—The judgment pronounced by the court of appeals reverses the judgment of this court and orders a new trial, unless the plaintiffs stipulate to deduct certain amounts with interest ; but, if they do thus stipulate, the judgment, as reduced by the stipulation, is ordered to stand affirmed in every other particular. In thus prescribing and enumerating certain specific conditions upon which the judgment is to stand, the court of appeals did not include that the plaintiffs should waive the costs of the appeal to the general term. It certainly could have done so ; but as it did not see fit to do so, it is not for this court to change the conditions upon which the plaintiffs may elect to end the litigation.

SEDGWICK, J., concurred.

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SPECIAL TERM, 1877—1879.

THE REAL ESTATE TRUST COMPANY, PLAINTIFF, v. EBENEZER H. BALCH, IMPEADED, &C., DEFENDANT.

I. MORTGAGE.

1. Assumption by grantee.

(a) BREAK IN CHAIN OF COVENANTS DOES NOT NECESSARILY RENDER SUBSEQUENT COVENANTS INOPERATIVE.

1. It does not when the subsequent covenant is a clear express one to pay the mortgage.*

II. REFORMATION OF INSTRUMENTS.

1. *Case in which it may be decreed.*

- (a) Where it clearly appears that a clause inserted in an agreement is contrary to the agreement pursuant to which the instrument was given, and contrary to the intention of the parties to the agreement, and was inserted in the instrument through the mutual mistake of all the parties thereto, and the party on whom the clause imposes a liability, satisfactorily accounts for his non-discovery of its insertion, the instrument may be reformed by striking out the clause, *unless an estoppel has arisen* in favor of a third party.

III. ESTOPPEL IN PAIS.

1. *Mortgage purchaser.*

(a) WHEN ESTOPPEL NOT RAISED IN FAVOR OF.

1. Where, after the purchase of a mortgage, the mortgaged

* This point was so ruled on the authority of *Vrooman v. Turner* (8 Hun, 78); the learned judge, although not satisfied by the reasoning of that case, regarded it as an authority binding on him at special term.

Since the decision of the above case, that of *Vrooman v. Turner* was reversed by the court of appeals (89 N. Y. 280).

The doctrine of the court of appeals in *Vrooman v. Turner* has since been applied, by the general term of the superior court, in *Cushman v. Henry*, 44 Super. Ct. 93.

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premises are conveyed subject to the mortgage which the grantee, by the deed, assumes and covenants to pay, such grantee is not estopped from insisting, as against such purchaser, that he is not liable under the covenant.

2. *Elements of estoppel in pais.*

(a) Three elements must concur.

1. A declaration made, or act done by the party against whom the estoppel is claimed, with intent that it should be acted on.

2. That the party claiming the estoppel relied and acted upon such declaration or act.

3. That the party claiming the estoppel would be injured if the other party were permitted to retract his declaration under his act.

1. None of these elements exist in the above put case of the purchase of a mortgage.

IV. PARTIES, DEFECT OF, HOW CURED.

1. Reformation of instruments, action for.

(a) Omission of one of the parties to the instrument may be cured by the written consent of the party omitted.

Before FREEDMAN, J., at Special Term.

Decided March, 1877.

The action is brought upon three bonds and mortgages made by Caroline A. Scranton to Eliza A. D. Tweed on premises on West Seventy-fourth street, in the city of New York, and dated January 15, 1874.

On July 9, 1874, Eliza A. D. Tweed assigned these three bonds and mortgages to S. Foster Dewey, who on July 24, 1874, assigned them to the plaintiff.

By deed dated July 23, 1874, and recorded August 13, 1874, Mrs. Caroline A. Scranton, together with her husband, conveyed the mortgaged premises to Harriet N. Trask, subject to the said mortgages. In said deed the grantee did not assume to pay the mortgages, nor the debt secured by them.

By deed dated October 2, 1874, and recorded February 11, 1875, Mrs. Harriet N. Trask, together with

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her husband, conveyed the mortgaged premises to the defendant Ebenezer H. Balch. This deed contains the following, after the habendum clause, viz.: "Subject nevertheless to three certain indentures of mortgage affecting said premises and given to secure the aggregate principal sum of \$12,000 and interest, and said party of the second part hereby assumes said mortgages and agrees to pay said principal sum as a part of the consideration hereinbefore set forth, together with all interest thereon from the — day of —, 1874."

A foreclosure of the mortgages has been had; the property has been sold, and a judgment for deficiency was entered against Balch by default. Then Balch obtained leave to answer the complaint and to litigate the question of his liability for deficiency, the judgment obtained to stand as security.

Davies, Work, McNamee & Hilton, attorneys, and *Julien T. Davies*, of counsel, for plaintiff.

Isaac L. Egbert, attorney, for defendant Balch.

FREEDMAN, J.—The principal questions raised by the answer of the defendant Balch are:

(1) That Mrs. Harriet N. Trask, the grantor of Balch, was not liable to pay the mortgages, nor the debt secured by them, and that consequently there was no valid assumption by Balch under the deed to him; and,

(2) That the assumption clause contained in the deed to Balch was placed there by mistake, contrary to the intentions of the parties to said deed, and hence was without consideration.

It may be stated, as a general rule, that if a grantee accepts a deed containing a clause stating that he thereby assumes the payment of a certain mortgage upon the premises conveyed, he is deemed to have entered into an express undertaking with the grantor

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to do so, and he is fully bound, though he does not sign or seal the instrument (*Belmont v. Coman*, 22 *N. Y.* 488).

The first question which therefore arises is whether the defendant Balch can avoid his liability under the assumption clause contained in the deed to him by showing that his grantor, Mrs. Trask, had not, in the conveyance of the premises to her, assumed payment of the mortgages in question, nor the debt secured by them.

Prior to the decision in *Lawrence v. Fox* (20 *N. Y.* 268), the courts of this State placed the liability of a grantee who had assumed payment, upon the ground that, as between the grantor and the grantee, the grantee, by the agreement of assumption, became the principal debtor of the mortgage debt, and the grantor stood in the situation of surety for him; that the agreement of the purchaser was given for the indemnity of the vendor, who thus stood in the relation of surety for him, and that the mortgage creditor was entitled to the benefit of such indemnity, upon the principle that where a surety, or person standing in the situation of surety for the payment of a debt, receives a security for his indemnity, and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security, though he did not even know of its existence; and consequently it was held that when the grantor, in whose conveyance such a stipulation was contained, was not himself personally liable for the mortgage debt, the holder of the mortgage acquired no right to resort to the grantee for payment (*King v. Whiteley*, 10 *Paige*, 465; *Trotter v. Hughes*, 12 *N. Y.* 74).

The case of *Lawrence v. Fox* (20 *N. Y.* 268), introduced a new principle for the enforcement of liability by reason of the assumption clauses under consideration, and this principle has taken the place of the doc-

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trine of subrogation in equity relied upon in the earlier cases, and has not only virtually set that doctrine aside, but has opened the door to liability beyond that enforced in those cases.

Lawrence v. Fox brought forward more prominently than had been done before, the principle that where one person makes a promise to another for the benefit of a third person, such third person may maintain an action upon it although not privy to the consideration for the promise, nor cognizant of the promise when made. Whatever doubt was at first cast upon this decision, by the fact that it was made by a divided court, was removed in Burr v. Beers (24 N. Y. 178), where the court unanimously reaffirmed the doctrine without discussion on the ground of *stare decisis*. This was a case where the mortgagor conveyed to the defendant by a deed containing words of express assumption. The action, however, was not brought to foreclose the mortgage, but directly against the grantee upon the promise of assumption. Judge DENIO, who had delivered the opinion in Trotter v. Hughes (12 N. Y. 74, approving King v. Whiteley), also delivered the opinion in this case, and declared that the principle of equitable subrogation could not be applied to the case, but that the principle laid down in Lawrence v. Fox governed, and that under that the plaintiff was entitled to recover.

But although the doctrine of Lawrence v. Fox has ever since remained as the rule of decision, in cases clearly within the principle there decided, the courts have been disinclined to extend it, and many subsequent cases, which were claimed to fall within the rule as stated in Lawrence v. Fox, have been distinguished from that case.

In some of them, some element in the definition of the rule given in Lawrence v. Fox has been wanting. Of this character is Turk v. Ridge (41 N. Y. 201),

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where there was no absolute promise, but a bond to be void in case the obligor paid the third person. So in *Dingeldein v. Third Avenue R. R. Co.* (37 *N. Y.* 575, reversing 9 *Bosw.* 79) where the court intimates that taking a conveyance subject to a lien would not be a promise to pay the lien, but holds that taking it subject to a payment to be made, which is not a lien, amounts to such a promise and to an express contract to pay.

Garnsey v. Rogers (47 *N. Y.* 233) was a case in which a deed, absolute on its face, but in fact intended as a mortgage, was given containing a clause of assumption of prior mortgages. The court went fully into a discussion of the principles upon which, in such cases, the liability of grantees rests, but decided that, as the conveyance was a defeasible one, and had in fact been canceled by a reconveyance, the grantee was not liable. In delivering the opinion of the court on that occasion, RAPALLO, J., uses the following language concerning the cases of *Lawrence v. Fox* and *Burr v. Beers*, viz:

"I do not understand that the case of *Lawrence v. Fox* has gone so far as to hold that every promise made by one person to another, from the performance of which a third would derive a benefit, gives a right of action to such third party, he being privy neither to the contract nor the consideration. To entitle him to an action, the contract must have been made for his benefit. He must be the party intended to be benefited; and all that the case of *Lawrence v. Fox* decides is, that where one person loans money to another, upon his promise to pay it to a third party, to whom the party so lending the money is indebted, the contract thus made by the lender is made for the benefit of his creditor, and the latter can maintain an action upon it. JOHNSON, Ch. J., and DENIO J., placed their votes upon the distinct ground that

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the contract could be regarded as having been made by the debtor as the agent of his creditor, and that the latter could ratify the contract thus made for his benefit. . . . The case of *Burr v. Beers*, though in conflict with *Mullen v. Whipple* (1 *Gray*, 317), and apparently in conflict with *King v. Whiteley* (10 *Paige*, 465) and *Trotter v. Hughes* (12 *N. Y.* 74), may well be sustained for the reason mentioned by Chancellor KENT, in *Cumberland v. Codrington* (3 *Johns. Ch.* 254, 258, 261), where he intimates that a *special agreement* between the purchaser and seller of the equity of redemption, by which the amount of the mortgage debt is considered as so much money left in the hands of the purchaser for the use of the mortgagee, would be sufficient ground for a suit at law by the mortgagee."

Upon the principles actually decided by the authorities so far considered, it seems as if the claim of the defendant Balch that he is not liable for any deficiency, for the simple reason that his grantor was not liable, could not be denied.

But in strange contrast with the careful distinctions and guarded language of the court of appeals is the language of the commission of appeals in *Thorp v. Keokuk Coal Co.* (48 *N. Y.* 253). In this case the grantee's deed contained a clause of assumption, but the mortgage itself provided that in case of default recourse should first be had by foreclosure and sale to the property described in the mortgage, and that the mortgagor should only be answerable for any deficiency of the mortgage debt after such foreclosure and sale. EARL, C., after referring to the doctrine of *Lawrence v. Fox*, says: "It matters not that the mortgagor was not liable to pay personally until after foreclosure, and that he was then liable only for the deficiency. It would have made no difference, if he had not been liable at all, the defendant having promised, upon a suf-

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sufficient consideration, to pay the debt. This suit is not primarily upon the bond and mortgage, but upon the promise of the defendant to pay it. . . .”

The natural deduction from this opinion is that every promise made on sufficient consideration to do an act beneficial to a third party will sustain an action by such third party, whether he be a creditor of the person to whom the promise is made or not, or have, or have not any interest in the matter other than that arising from the promise; so that, if this view be correct, the remarks of the court of appeals in *Garnsey v. Rogers* in reference to the cases of *Lawrence v. Fox* and *Burr v. Beers* are at least inappropriate, since the commission of appeals thus assert to be law all that could be implied from the most liberal interpretation of those cases.

The same conflict of views also appears from a comparison of the case of *Claffin v. Ostrom* (54 *N. Y.* 581), decided by the commission, with the case of *Merrill v. Green* (55 *N. Y.* 270) decided by the court of appeals.

The existence of this conflict of judicial opinion as to the extent to which the doctrine of *Lawrence v. Fox* is to be carried, renders it difficult to determine what the precise state of the law is which is to govern the case at bar upon the point I have been considering. None of the cases above referred to directly determines the point in question. The only reported decision which is directly in point, was recently made by the general term of the supreme court of the second department. It was there expressly decided that a grantee of real estate is liable to a mortgagee on a covenant in the deed to pay a mortgage on the land, although his grantor was not liable (*Vrooman v. Turner*, 8 *Hun*, 78). The reasons assigned for so holding are far from being satisfactory to my mind; but as the decision made was made at general term, I deem it best to follow it at special term.

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The defendant Balch being therefore *prima facie* liable upon his covenant of assumption, though his grantor was not, the next question to be considered is whether he can defeat such liability by showing that such covenant was inserted by mistake.

All the cases agree that such a covenant, in order to be enforceable by a third person for whose benefit it was made, must in point of fact have constituted part of the bargain between the parties to the deed in which it is contained, and that it must rest upon a sufficient consideration. It is not necessary that the consideration should pass from the party seeking to enforce it. But a sufficient consideration between the covenantor and his immediate covenantee is indispensable.

Now it appears by the uncontradicted testimony of Balch, and of the witness Benjamin J. H. Trask, who had conducted the negotiation with Balch as agent of his wife, that the assumption clause appearing in the deed to Balch was placed there by mistake; that it was neither the agreement nor the intention of the contracting parties that Balch should incur any personal liability; that, on the contrary, both the intention and the agreement of the parties was that Balch was not to assume the payment of the mortgage debt. The evidence fully establishes the fact that the mistake was a mutual one, and Balch satisfactorily accounts for not discovering it before the commencement of the suit.

These facts, therefore, establish not only that the covenant in question was no part of the bargain between the parties to the deed, but also that its appearance in the deed was wholly without consideration. They consequently constitute a complete equitable defense. The right to interpose such a defense is expressly conferred by section 150 of the Code. True, a defense like the one which has been interposed in this action, should be closely scrutinized; but, at the same

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time, full effect must be given to it, when fully and satisfactorily established. It having been thus established, the defendant is just as much entitled to the benefit of it, as the defendant in *Garnsey v. Rogers* was held entitled to the benefit of the defense, that in that case the conveyance was a defeasible one, and had in fact been canceled by a reconveyance. Nothing short of an estoppel could deprive him of it; but of this there is no evidence. Three elements are necessary to constitute estoppel: (1) Declaration made or act done by the defendant, with the intent that it should be acted upon; (2) That the plaintiff relied and acted upon such declaration or act; and, (3) That the plaintiff, thus misled, would be injured in case the defendant were permitted to retract his declaration or undo his act.

Every one of these elements is lacking in the case at bar. Plaintiffs having purchased the mortgages in question before the deed to Balch was made, it cannot be said that they were influenced or misled by the insertion of the covenant. Nor is there any pretense that they were subsequently misled in any way by discovering it. At the time of the execution of the deed to Balch, Mr. Trask, the owner of the fee, was not liable for the mortgage debt. Neither she nor Balch was under any duty or obligation to the holder of the mortgages to deal with the premises in a particular way. Both were free to make any contract or bargain concerning the mortgaged premises they might see fit to make. Hence the actual fact, the intention of the parties, must govern.

My conclusion is, that upon the facts as they appear, the defendant Balch is entitled to a dismissal of the complaint so far as the same asks for a judgment for a deficiency against him, to a vacation of the provision of the judgment heretofore entered, adjudging him liable to pay the deficiency, and to a reformation of the deed to him by striking therefrom the covenant

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of assumption which was inserted by mistake, as aforesaid. Plaintiffs' objection to the reformation of the deed, on the ground that in the present position of the case the proper parties are not before the court, is obviated by the consent in writing of the defendant Harriet N. Trask, which was produced on the trial. She is, besides the plaintiff, the only party entitled to be heard upon the question.

I am also of the opinion that no costs should be awarded to the defendant Balch.

SAMUEL HATHAWAY, PLAINTIFF, v. HENRY
RUSSELL, DEFENDANT.

I. ACCOUNTING, ACTION FOR.

1. Reference to hear and determine issues, the determination of the issues not involving the taking of the account.

(a) REFEREE'S ACTION AND REPORT, WHAT PROPER.*

1. To hear, determine, and report on the issues, and if he

* The question whether, under an order referring all the issues to a referee to hear and determine, without also constituting him a referee to take and state the account in case he should determine that plaintiff was entitled to an account, the referee was empowered to take and state the account, seems not to have been involved in above case, and is not considered in the opinion.

In *Palmer v. Palmer* (18 How. Pr. 363), it is held that under such an order of reference, the referee is empowered to take and state the account. It is submitted that the reasoning by which the court reached that conclusion is not satisfactory. It is this: The court, upon a trial before it of the issues, had the power, in case it determined in favor of an accounting, to proceed and itself take and state the account. A referee to whom all the issues are referred to hear and determine stands in the place of and is substituted for the court. Therefore a referee has the same powers of the court and can, the same as the court could, proceed to take and state the accounts. The error in the argument is that the order of reference does not invest the referee with *all* the powers of the court. It only invests him with as

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decides that plaintiff is entitled to an accounting, then to pass on the principles on which the accounting should be had, so far as the same are involved in the determination of the issues, and to *direct the entry of an interlocutory judgment* for an accounting in conformity with his report.

(b) PROCEEDINGS UPON A REPORT DIRECTING INTERLOCUTORY JUDGMENT FOR AN ACCOUNTING.

1. *Entry of interlocutory judgment in conformity with the report is matter of course*, unless there are allegations of irregularity, surprise, or newly-discovered evidence.

1. *Motion for interlocutory judgment on such report.**

(a) *What cannot be reviewed on.*

1. Neither the merits nor any alleged error in the admission or rejection of evidence, or in the finding.

(a) *Mode in which a review of the merits or of alleged errors, is to be obtained, pointed out.*

(c) ACCOUNT, TAKING OF.

1. Mode of proceeding under interlocutory judgment directing an accounting by defendant.

(a) *Plaintiff has a right to the formal bringing in by de-*

much of the power of the court as relates to the hearing and determining of the issues (i. e., the trial thereof), and matters incidental thereto. Now the court takes and states the account, not by virtue of its power to hear and determine issues, but by virtue of its general powers, wholly distinct and independent of its power to hear and determine. As the power of the court to take and state accounts is not derived from, but wholly independent of its power to hear and determine, it follows that the transfer of the latter power to a referee does not carry with it the former.

Cases will arise where it would be deemed advisable, by the court and parties, to entrust the decision of the issues to one person, and the taking of the accounts to another, by reason of the peculiar aptitude for, skill in, and knowledge of the duties to be performed by them respectively, in the execution of the trust to be confided to them.

* It would seem that no motion to the court for interlocutory judgment is necessary, unless questions are reserved by the report to be passed on by the court; but that such judgment should be entered by the clerk, as of course. If it is sought to set aside the report on the ground of irregularity, or to open it and have a new trial on the ground of surprise or newly-discovered evidence, a motion should be made therefor in the same manner as when it is desired to set aside a verdict for like causes.

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*defendant of the account in the form of debit and credit and duly verified, and to his examination on interrogatories.**

Before FREEDMAN, J., at Special Term.

Decided October 27, 1879.

Motion for interlocutory judgment.

FREEDMAN, J.—The referee to whom it was referred to hear and determine the issues, reported only in favor of plaintiff's right to an accounting within certain limits, but did not take and state the account between the parties. This course was adopted in order to facilitate a review of his decision before putting the parties to the expense of a long accounting, and the plaintiff now applies for an interlocutory judgment, in conformity with the report. This practice has prevailed before the new Code (2 *Van Santvoord Eq. Pr.* 194, 195), and I cannot find that the latter has abrogated it.

Upon the present application I cannot consider allegations of error, nor review the merits, for the evidence is not before me, and there being no allegation of irregularity, surprise, or newly discovered evidence, an interlocutory judgment should be entered as of course in conformity with the report.

Defendant's right of review may then be exercised, either under section 1001 of the new Code by motion for a new trial to the general term, or, under section 1349, by appeal to the general term from the interlocutory judgment.

If the defendant simply claims that the findings of fact do not support the conclusions of law, he may,

* It would seem that under the present practice written interrogatories and written answers thereto are not absolutely requisite; but that the party may be examined orally before a referee as to his accounts.

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within ten days after service of a copy of the decision or report of the referee, and notice of the entry of the interlocutory judgment thereon, file exceptions to the conclusions of law and rely solely upon them.

If, on the other hand, he claims that there is no evidence to sustain the findings of fact, or that the referee refused to find facts which he should have found, and desires a review of the questions of law arising upon such findings, or refusals to find (for such questions constitute questions of law under section 993), or if he desires a full review upon the law and the facts under section 1349, he must make, serve and print a full case containing the appropriate exceptions together with the evidence.

But whichever mode of review he may resort to, he must go to the general term ; for the remedy, by motion for a new trial on the judge's minutes, or by a similar motion to the special term on a case, applies only to trials by jury, while section 1002 expressly provides that a trial by a referee cannot be reviewed, by a motion for a new trial, founded upon an allegation of error in a finding of fact, or ruling upon the law, except in a case specified in section 1001.

As to the mode in which the interlocutory judgment should direct the accounting to proceed, it must be considered that an accounting before a master in chancery was regulated by the rules of that court, the 107th of which provided that "all parties accounting before a master shall bring in their accounts in the form of debtor and creditor ; and any of the other parties who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories as the master shall direct."

In *Wiggins v. Gañs*, decided in 1851, in the superior court with the concurrence of three judges, it was held, that the rules and practice of the court of chancery, on the subject of accounting, existing at the time

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of the adoption of the Code, are not inconsistent with any provision of the Code, and that consequently, by section 469, they are continued in force. The defendant, in that case, was thereupon ordered to bring in an account like that prescribed by the said 107th rule, duly verified as prescribed by the chancellor, and file it with the referee within ten days, in default of which the plaintiff might apply for an attachment.

Since that time the same rule has been recognized by the supreme court in *Palmer v. Palmer* (13 *How. Pr.* 364), and *Ketchum v. Clark* (23 *Barb.* 319), and I cannot find that any change has been effected by the new Code.

The conclusion is, therefore, that although the formal mode of proceeding under the chancery rules must not necessarily be pursued, the plaintiff nevertheless has the right, if he demands it, to the formal bringing in of the account in the form of debit and credit, as prescribed by the rule, and duly verified by affidavit as stated in *Story v. Brown* (4 *Paige*, 112), and *Benson v. Leroy* (1 *Id.* 122), and to the examination of the defendant upon interrogatories.

The motion for interlocutory judgment must be granted as prayed for.

DANIEL R. KENDALL, PLAINTIFF, v. HENRY P.
NIEBUHR, AARON B. WOODRUFF AND
OTHERS, DEFENDANTS.

I. MORTGAGEE.

1. DISCHARGE OF PART OF PREMISES ALIENED BY
OPERATION OF A RELEASE OF THE PART RETAINED.

1. GENERAL RULE DOES NOT OPERATE, WHEN.

1. Does not, unless the *releasor* has knowledge of the fact of the alienation or notice sufficient to put him upon inquiry.

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(a) NOTICE, SUFFICIENCY OF.

1. *What is not.* The record of the deed of itself is not.
2. *What is.* Where it appears that the deed was recorded before the release was given, that the releasor employed an attorney to make the necessary searches and prepare the release, who did make the searches, and found various conveyances (there being ten several lots released), and reported the result to his client, and the attorney, being called as a witness, did not, by his evidence, negative the presumption that he found the deed of the lot in question on record,—*Held*, sufficient notice to the releasor, although he testified that he could not recollect that he was informed of the conveyance of the lot in question.
2. Does not operate as a discharge *from so much of the debt as remains after* applying thereto the value of the lands released, even though the releasor had notice of the alienation.

3. INVOLUNTARY RELEASE.

1. *Building contract.* Land was conveyed, and a mortgage taken back for the whole purchase-money, and simultaneously therewith a contract was entered into between the vendor and vendee, whereby the vendee agreed to erect eleven houses on the land, and the vendor agreed to loan money to the vendee to be applied toward the erection of buildings thereon, the advances to be made at certain steps of the building, and to take back mortgages for the advances, and on the completion of the houses a mortgage was to be given on each house and lot for the one-eleventh of the whole purchase-money and of the advances, and all other mortgages were to be removed and canceled. At a certain stage of the contract there was due the vendor for advances \$18,700, and for purchase-money \$29,920, total, \$48,620. The vendee then made to an insurance company eleven mortgages, each for \$4,000, one on each lot. The money received on these mortgages (\$44,000), was paid over to the vendor (who discharged the purchase-money mortgage) thus leaving due the vendor \$4,620. Thereafter the vendor made another advance called for by the contract, amounting to \$6,600, making then due him \$11,220.

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for which the mortgage in suit, covering all the lots subject to the mortgages held by the insurance company, was made to him by the vendee and his wife. The description in this mortgage does not indicate into how many lots the premises were subdivided; but contained this provision: "In case of foreclosure of this mortgage, all to be sold in one parcel, or in single lots, at option of" the mortgagee. It was agreed between the vendor and vendee, that this mortgage should be held by the vendor, as security, until he got his final mortgages, which would be eleven of \$1,770 each. This mortgage was recorded May 17, 1878. By October, 1878, the vendee had sold and conveyed eight of the lots. One of the eight was the lot in question, which was sold and conveyed to the defendant August 23, 1878. Subsequent to this sale to defendants, the original vendor made to his vendee the last advance called for by the contract, amounting to \$8,250. Second mortgages of \$1,770 were given on each of these eight lots (except the one sold to defendants), which were turned over to the original vendor; the original vendee gave to the original vendor a second mortgage of \$1,770, on each of the three lots remaining unsold by him. The ten lots on which the second mortgages of \$1,770 were given, were released from the mortgage of \$11,220. It was agreed between the original vendor and vendee, that these ten mortgages should be applied first to the last advance of \$8,250, and then on the mortgage for \$11,220, which left \$1,770 of the mortgage of \$11,220 (which \$1,770, with the first mortgage of \$4,000 on the lot, constitutes one-eleventh of \$63,470, the aggregate amount of the purchase-money and advances), a charge on defendants' lot, unless that lot was relieved therefrom by force of the above-mentioned releases. It should be mentioned that the deed to defendants conveyed subject to two mortgages amounting in the aggregate to \$5,000, which, by their answer, they admit had reference to the mortgage of \$4,000, and to one-eleventh of the mortgage of \$11,220.

HELD,

that the mortgage for \$11,220 continued to be, and was a lien on defendants' lot to the extent of \$1,770, with interest.

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II. VENDOR'S LIEN.

1. *Under the above circumstances, and it further appearing that the deed to defendant was made in payment of materials, &c., theretofore supplied by them to the vendee, which were used for, and upon the houses.*

Held,

that the contract between the vendee and vendor constituted an equitable mortgage and a specific lien for the said sum of \$1,770, on defendants' lot, and the vendor was in this aspect entitled to a judgment of foreclosure and sale.

Before FREEDMAN, J., at Special Term.

Decided November 17, 1879.

William McDermot, for plaintiff.

Edward P. Flint, for the defendants Woodruff, Conklin & Bayer.

FREEDMAN, J.—This is an action for the foreclosure of a mortgage to the extent of a balance of \$1,770 claimed to be still due upon it. The mortgage originally covered a number of lots, but foreclosure is prayed for only against a certain lot owned by the defendants Woodruff, Conklin & Bayer, who are the only litigating defendants.

The questions involved are somewhat novel and interesting, as well as complicated, and in consequence thereof they received special attention.

On October 6, 1877, Daniel R. Kendall made a deed to Niebuhr of a number of lots on One-Hundred-and-Twenty-first street in the city of New York, presenting a frontage on said street of 187 feet, and received from Niebuhr the latter's bond and mortgage on said lots for \$29,920—which was the purchase price. Contemporaneously therewith the said parties entered into a written contract whereby Niebuhr agreed to erect on said lots eleven houses, each of the dimensions of seventeen by forty-five feet, as therein provided, and to

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have them completed before May 1, 1878, and whereby Kendall agreed to make advances as follows, viz. :

- “ When all the houses are enclosed, girders and posts in cellar, leaders connected with sewer, bridging done, window frames in, coping on roof, and chimneys, skylight and scuttle on, the roof on all completed, an advance to be made on each house of \$1,200.00
- “ When floors are laid, studding, brown-ing and scratch coating done, sewer con-nections made ; grounds or jakes set for doors and windows in all the houses, . \$500.00
- “ When the hard finishing and trimming is done, stairs up, sashes hung and glazed, mantels in, brown stone stoops completed, and doors all hung in all the houses, \$600.00
- “ When said houses are fully completed, including warming apparatus, grates and mantels, flagging and all yard work done, front and rear, in each house, . . . \$750.00

The contract further provided as follows, viz. :

“ For each of the above advances the said Kendall agrees to receive the bond and mortgage of the said Niebuhr with the signature of his wife, payable on or before May 1, 1878, with interest at 7 per cent. and usual interest, tax, assessment, and insurance, clauses, provided all the said houses and lots are free from all grants, mortgages, liens, judgments, or otherwise, at the time the said payments are due. Interest on all said mortgages, mentioned in this agreement, with cost of drawing and recording the same, and all taxes and assessments then confirmed, to be taken out of last-mentioned payment. On the final completion of all of said houses the said Kendall agrees to receive the bond and mortgage (containing usual clauses) of said Niebuhr for \$5,770 on each house and lot, being

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\$2,720 for the cost of the lot, and \$3,050 for the advance, making together \$5,770, payable, with 7 per cent. interest semi-annually, in one year if negotiated with an incorporated company, or three years if otherwise. The said Niebuhr to make the said bonds and mortgages payable to such parties as the said Kendall may direct. The said Kendall hereby agrees (the said mortgage for \$5,770 having been recorded) to remove and cancel all the other mortgages mentioned in this agreement, provided that each of said houses and lots are free from all incumbrances by grants, mortgages, liens, judgments, or otherwise. The said bond and mortgage for \$5,770, each to be divided at the option of said Kendall into two mortgages, in aggregate for the said sum of \$5,770," &c.

On May 16, 1878, the following state of facts existed :

Kendall had advanced to Niebuhr the first two installments called for by the contract, amounting in the aggregate to,	\$18,700.00
which, with the price of the lots, viz. :	29,920.00

made the sum of,	\$48,620.00
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Niebuhr had executed to the New York Life Ins. Co. eleven mortgages, one on each house and lot, and each for \$4,000, for which Kendall had received the money upon a surrender, as may be assumed, of his purchase-money mortgage,	\$44,000.00
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This left a balance due to Kendall of,	\$4,620.00
Kendall then made to Niebuhr the third advance called for by the contract, amounting to,	\$6,600.00

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which made the balance due to Kendall
on that day \$11,220.00

For this amount the mortgage in suit was executed by Niebuhr and wife, and the same was duly recorded May 17, 1878, as in the complaint alleged. It was made payable July 1, 1878, and covered the entire premises, subject, however, to the eleven mortgages held by the New York Life Ins. Co. From the description of the premises which was used, it does not appear into how many lots the 187 feet of ground described were laid out, but at the end of the description the following provision occurs: "In case of foreclosure of this mortgage all to be sold in one parcel, or in single lots at option of said Daniel R. Kendall."

Kendall also testified that it was further agreed that this mortgage was to be held by him as security until he got his final mortgages, namely, eleven second mortgages of \$1,770 each, and that upon the receipt of those it was to be discharged.

Niebuhr then went on with the erection of the houses, and the last payment under the contract, amounting to \$8,250.00, was made to him by Kendall after September 26, 1878.

As the houses neared completion, Niebuhr made attempts to effect sales, and by October, 1878, he had sold eight of them, with the land upon which each stood respectively. Among them was one which was sold to the defendants Woodruff, Conklin & Bayer by deed recorded August 23, 1878, and upon conditions which will be specially noticed hereafter. As to the other seven, each house and lot was sold, subject to a first mortgage of \$4,000 held by the New York Life Ins. Co., and the purchaser, in each case, as a part of the consideration paid, executed a second mortgage for \$1,770, which was turned over to Kendall. Upon each of the three houses and lots remaining unsold, Niebuhr

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executed and delivered to Kendall a second mortgage for the same amount.

The ten mortgages thus received by Kendall were by agreement between him and Niebuhr applied in repayment of the last advance of \$8,250 made by Kendall under the contract, and then in payment, to the extent of \$9,450, of the mortgage of \$11,220.

Upon the receipt of each of the said ten second mortgages Kendall released the premises covered by it respectively from the lien of the general mortgage.

The consequence of this course of dealing was, that in October, 1878, every house and lot had been released except the one purchased by the defendants Woodruff, Conklin & Bayer, against which the general mortgage constituted a lien to the extent of \$1,770.

To foreclose that mortgage to the extent named against said premises, the present action was commenced in April, 1879.

Woodruff, Conklin & Bayer, as already stated, purchased the house and lot in question in August, 1878. The deed to them bears no date, but it was recorded August 23, 1878. For a consideration therein expressed of "one dollar (and other good and valuable consideration)" it conveys the premises in question, subject "to two mortgages on said premises, amounting in the aggregate to the sum of five thousand dollars." The consideration for this deed was, in fact, an indebtedness due by the grantor to the grantees for materials theretofore supplied which had been used for and upon the houses. By their answer these defendants admit that this sum had reference to the mortgage of \$4,000, held by the New York Life Ins. Co., and to the proportionate one-eleventh share of the principal sum of the mortgage of \$11,220, and they also admit the option secured to Kendall by the last-mentioned mortgage as to the manner in which, in case of foreclosure, the sale is to be made.

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They insist, however :

1. That the plaintiff has precluded himself from enforcing the mortgage against the house and lot in question for the amount of \$1,770, or any amount whatever, because the ten releases executed by him operated as a discharge of their house and lot from the lien of the mortgage ; and,

2. That in any event the receipt of the ten second mortgages operated as a payment and satisfaction of the mortgage of \$11,220.

As to the first ground:

The general rule undoubtedly is that when a mortgagor sells a portion of the lands which the mortgage covers, those which he retains become primarily liable for the satisfaction of the debt, and that those which he has conveyed are answerable only for an eventual deficiency ; and, as a necessary consequence, that a similar equity prevails between purchasers, so that distinct parcels or lots of the mortgaged lands which have been conveyed at different times to different purchasers, are chargeable in the inverse order of their alienation, and must be sold in that order under a decree. The equity which may thus have been created between a purchaser and the mortgagor, or between several purchasers, the mortgagee, when he has a knowledge of the facts, is not permitted to disregard or to disturb, and, with this knowledge, he acts at his own peril when he releases from the lien of the mortgage any portion of the lands which it embraces. If the lands released are primarily liable, and are of sufficient value to satisfy the debt, those previously conveyed are wholly discharged, and in no case can they be charged with any larger sum than the proportion of the debt that may remain unsatisfied when the value of the lands released has been applied and exhausted. (Howard Ins. Co. v. Halsey, 4 Sandf. 565 ; affirmed, 4

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Seld. 271 ; *Gouverneur v. Lynch*, 2 *Paige*, 300 ; *Schryver v. Teller*, 9 *Id.* 173.)

The existence of this equity does not depend upon the nature or extent of the consideration received by the mortgagor for his conveyance, or by the mortgagee for his release ; but before the obligation arises on the part of the mortgagee to regard it, his conscience must be affected by knowledge of the facts upon which the equity depends, or by notice sufficient to put him upon inquiry (*Stuyvesant v. Hall*, 2 *Barb. Ch.* 151 ; *Guion v. Knapp*, 6 *Paige*, 35).

The mortgagee is not bound at his peril to ascertain whether any of the mortgaged lands have been aliened, or subsequently incumbered, when applied to to release part of the lands bound by his mortgage, nor is the recording of the mortgagor's deed to the purchaser notice to the mortgagee of the fact of the conveyance, because by the terms of the statute the constructive notice which arises from the recording of a conveyance of real estate, is limited to subsequent purchasers in good faith and for a valuable consideration of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded (*Howard Ins. Co. v. Halsey*, 4 *Seld.* 271 ; *Stuyvesant v. Hall*, 2 *Barb. Ch.* 151).

In the case at bar it sufficiently appears that Kendall not only had sufficient notice to put him upon inquiry, but also knowledge of the conveyance to Woodruff, Conklin & Bayer. According to his own testimony he retained, before accepting the ten mortgages, William McDermot, an attorney, to make the necessary searches, and to prepare the releases, and McDermot did make the searches, found the conveyances on record, and in due time informed Kendall of the result. True, Kendall says that he cannot recollect that he was informed of the conveyance to Woodruff, Conklin & Bayer specifically, and that he did not pay much atten-

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tion to whom the houses and lots had been sold. But the deed to Woodruff, Conklin & Bayer, having been duly recorded, the presumption is that McDermot in the discharge of his professional duty found it with the rest, and this presumption became conclusive, by the omission of McDermot, when called as a witness, to give testimony to the contrary. This being so, the knowledge which McDermot had as attorney before the delivery of the releases was in law equivalent to knowledge on the part of Kendall, even if the facts were not communicated to Kendall (*Bank of the United States v. Davis*, 2 *Hill*, 451; *Ingalls v. Morgan*, 10 *N. Y.* 178, 184, 185; *Dillon v. Anderson*, 43 *Id.* 231, 238; *The Distilled Spirits*, 11 *Wall.* 356; *Bank for Savings v. Frank*, 56 *How. Pr.* 403, 414).

If, therefore, the case at bar fell within the general rule stated, I should reopen the case for the purpose of ascertaining the order of the alienation of the different houses and lots, of which there is no evidence, and their value at the time of their respective release, as to which I excluded testimony. But I do not think that the case falls within the rule, and consequently the pursuit of inquiry in the directions mentioned is immaterial. For the same reason it is immaterial whether, in October or November, 1878, there was, or was not, anything due by Niebuhr to Woodruff, Conklin & Bayer for materials or other things supplied on all or some of the houses, or whether or not there were taxes upon the house and lot purchased by them at the time of the purchase.

The rule of charging the lands in the inverse order of their alienation, or of holding a portion remaining apparently covered by a mortgage discharged, in consequence of the release, by the mortgagee with notice, of the other portion which was primarily liable, is a mere rule in equity. The release to a subsequent purchaser is not a technical discharge of the lands previously

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conveyed from the lien of the incumbrance. Neither is it an equitable release or discharge, unless, upon the principles of natural equity and justice, it ought thus to operate against the party making the release to the subsequent grantee (*Patty v. Pease*, 8 *Paige*, 278).

In all the reported cases in which the general rule has been enforced against the mortgagee, the latter, when applied to to release part of the lands covered by his mortgage, was at liberty to grant or refuse the application. In the present case the release of the ten houses and lots was not a voluntary one, but one which, under the contract, Kendall was bound to give. If he had refused, Niebuhr or his assigns could have compelled it by action. Nor is the remaining house and lot sought to be held for more than by the terms of the contract it was liable for as its equal proportion of the price of the lots and the moneys advanced to build the houses. Both the contract and the mortgage of \$11,220 were anterior to the deed taken by the litigating defendants, and a portion of the money advanced after the delivery of the said deed was expended in finishing the house bought by them. The record of the mortgage of \$11,220, to which Woodruff, Conklin & Bayer took subject, was notice to them of the existence of a lien enforceable, under certain circumstances, against their house and lot, to the extent of the whole of the sum named in it, and though they may not have had actual notice of the precise amount due, or claimed to be due under it, nor of the terms of the contract, yet by the exercise of due care and diligence they could readily have obtained the necessary information. Moreover, within the principles laid down in *Payne v. Wilson* (74 *N. Y.* 348), and wholly independent of the fact that it was agreed that Kimball should have the right to hold on to the mortgage of \$11,220 until he got all the mortgages to which he was entitled, from which fact it may be inferred that the intention of the parties was

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that said mortgage, in case of partial payment, should be kept alive to cover subsequent advances under the contract, not otherwise secured, up to the amount named in it, the contract itself constitutes an equitable mortgage and, in equity, a specific lien upon the houses and lots which, unless released in fact, can be enforced by Kendall against any of the subsequent purchasers from, or creditors of, Niebuhr, to the extent of the amount actually due under it.

Under these circumstances Kendall has the prior equity, and it would be inequitable to enforce the rule referred to against him.

As to the second ground :

Upon this branch of the case the testimony is that in about the month of October, 1878, a settlement took place between Kendall and Niebuhr, in the course of which Kendall accepted the ten mortgages referred to : 1. In satisfaction of the amount of \$8,250, advanced by him under the contract subsequent to the mortgage of \$11,220 ; and, 2. In payment of the sum of \$9,450 on account of the last mentioned mortgage. It certainly was competent for the parties to make this settlement, which was not only fair and equitable in itself, but according to contract ; and specific application having been made in the course thereof, the court cannot step in and say that a different application must be made. Woodruff, Conklin & Bayer not only took, as they admit, subject to the proportionate share of the house and lot under the mortgage, without ascertaining the amount of such share, while the record of the mortgage charged them with notice of its existence as a lien to the possible extent of \$11,220, but, for reasons already given, they also took subject, whether considered as subsequent purchasers from, or creditors of, Niebuhr, to the equitable mortgage and specific liens in equity of Kendall under his contract, and all that at a time at

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which the house purchased by them was in an unfinished state. Much that has been said in the discussion of the first point, is also applicable to this branch of the case, but to avoid unnecessary repetition it is sufficient to say that the case is not one in which a subsequent debt has been tacked to the original mortgage, and in which that mortgage, with the debt thus tacked on, is sought to be enforced beyond the amount specifically secured by it against subsequent *bona fide* purchasers, or creditors for value.

My final conclusion is that in any aspect of the case the plaintiff has the prior equity as against the litigating defendants, and that he is entitled to the usual judgment of foreclosure and sale, as prayed for in the complaint.

A. EMILIUS OUTERBRIDGE AND JOHN S. SCOTT,
PLAINTIFFS, v. ROYAL PHELPS, DEFENDANT.

EASEMENTS.

1. GENERAL PRINCIPLES.

(a) VENDEE, BENEFITS TAKEN BY.

Where the owner of two or more tenements sells one of them, or the owner of an entire estate sells a portion, the *vendee* takes the tenement or portion sold *with all the benefits which appear* at the time of its sale, to belong to it, as between it and the property which the vendor retains.

BUT,

(b) VENDOR, IMPOSING CONDITIONS BY ON PROPERTY SOLD.

No burden or servitude can be imposed by the vendor upon the tenements, or portion sold, in favor of the property retained by him in derogation of his grant, without a reservation expressed in the grant, *unless both an apparent sign of servitude exists*, on the parts of the tenements or portions sold in favor of the property retained *and the easement claimed is strictly necessary* to the enjoyment of the property retained.

2. PARTICULAR EASEMENTS.

Statement of the Case.

(a) RIGHT OF WAY OF NECESSITY.

1. *Arises only* where there is no access to the dominant estate, except over the servient one. The fact that a way existing over the dominant land is too steep or too narrow, or less convenient, does not alter the case.
2. *Ceases, when* the owner of the dominant estate acquires by the purchase of other lands, or otherwise, a way of access from a highway over his own land to the land to which the way belongs.

(b) SIGNS, RIGHT TO AFFIX.

1. If merely incidental as guides to an existing right of way, it would fall with the right of way.
2. As it involves, in the case at bar, a periodical putting up and taking down of signs of various forms, sizes and appearances, it cannot be sustained, *even in the case of a general reservation*, without proof that the burden upon the servient estate is not increased thereby beyond the extent reserved; and in the absence of a reservation, it can be sustained only upon the additional proof of strict necessity and visibility.
3. *Advantage to business not sufficient.* Although, in the city of New York, it might be advantageous or even necessary for the transaction of their business, by occupants of premises fronting on a side street, that their premises should appear to be Broadway property, yet such requirement, on the part of their business, does not, in any legal or proper sense, constitute a necessity for the proper enjoyment of the premises.

Before FREEDMAN, J., at Special Term.

Decided December 23, 1879.

Motion for the continuance of an injunction restraining the defendant from cutting off a right of way claimed by the plaintiffs through the door and hallways of the building No. 29 Broadway, in the city of New York, and from tearing down, or removing from the front of said building the signs of the plaintiffs.

Sutherland & Scott, attorneys, and *Francis M. Scott*, of counsel, for plaintiffs.

Lord, Day & Lord, attorneys, and *George De Forest Lord*, of counsel, for defendants.

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FREEDMAN, J.—The case, as made by the papers, submitted on both sides, involves no controversy as to the material facts. They are as follows, viz.:

The building fronting on Broadway, known as No. 29 Broadway, and now owned by the defendant, was built first as a separate building. The next, immediately in the rear of the first, which in the motion papers is sometimes styled the "rear building" and sometimes the "extension building," was erected afterwards fronting upon Morris street, and filling up the whole space in the rear of the original building, lying between the latter and the side walls of two dwellings, adjoining on the west, and fronting and opening upon Morris street as their only outlet. More than twenty-five years ago, all four of these buildings were used together as a boarding-house. While they were so used, the front building had staircases of its own, in the rear of the hallway, over and through which the plaintiffs claim a right of way. There was an opening in the west end of the hallway into the so-called rear or extension building; and the main and customary entrance to all parts of the four buildings, while occupied and used together as stated, was through the door and hallway of the building fronting on Broadway. But there were also staircases in said rear or extension building, connecting the upper floors with the ground floor, from which, through doors still in existence, access could be, and I have no doubt, as occasion required, was had to Morris street; and there were other independent entrances from Morris street, which also still exist, and by which access could be, and was had into the two most westerly buildings, and through them to all parts of the four connected buildings. The staircases by which access was thus had to and from Morris street through the two most westerly buildings, are still standing, but are included in and covered by lettings to tenants of the present owner.

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From the intersection of Broadway and Morris street, the grade of Morris street towards the west is descending, so that the first or ground floor of the building fronting on Broadway, was and is on a level with the second floors of the extension building, and the two most westerly buildings fronting on Morris street, and the ground or first floors of the buildings last referred to were and are on a level with the basement of the Broadway building. The premises, with these four buildings thereon, were next leased and occupied by the firm of Spofford & Tileston, who kept open the communication which existed between the front and rear buildings, and used the rooms in the front building for their general office, and rooms in the rear parts for a record room, porters' room, water-closets, coal bins, &c.

In 1863, while the premises were thus used and occupied by said firm, Paul N. Spofford became the owner of them, subject to two mortgages upon the whole, amounting in the aggregate to the sum of \$50,000. These mortgages have been assigned to and are now held by the Mutual Life Insurance Company. From the time Spofford became the owner, he rented out offices in the building to tenants for business purposes.

A short time before May, 1865, Spofford made extensive alterations in the premises, for the purpose of rendering the whole of the premises suitable and available for business purposes, and put them in the condition in which they still are. Among other things not necessary to be specially mentioned, he widened the front hall on the *first* floor of the front building and continued the passage-way thus widened straight to the extreme westerly end of the four buildings, and he also removed the staircase in the front building, and constructed one in the east end of the so-called rear or extension building, by which access was provided to each floor of the four buildings. From that time forward

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the entrances on and from Morris street ceased to be used, and the tenants of the offices in the so-called rear building were obliged and of necessity permitted to pass in and through the door and hallway of the building fronting and facing upon Broadway, and the tenants of the upper parts of the Broadway building were obliged and of necessity permitted to pass up and down the staircases erected in the rear or extension building; and all tenants, no matter in what part of the connected buildings their offices were situated, were permitted to display and keep upon the front of the Broadway building signs indicating their names and the character of their business. On the ground floor of the rear or extension building, situate between the building fronting on Broadway and the two most westerly buildings, there are four small shops, which face and open on Morris street, and they were deprived of the communication that formerly existed between the ground floor and the upper part of said building.

In January, 1873, the Mutual Life Insurance Company, in consideration of \$25,000 paid on its mortgages, released the entire front or Broadway building to Spofford, by an instrument containing no reservations, and about the same time Spofford mortgaged the premises so released to William Albert and Charles Hickman, as executors of the estate of Richard Adams, deceased, to secure a loan of \$50,000. This mortgage contained no reservations, and was recorded February 6, 1873.

After the mortgage last referred to had been made and recorded, the plaintiffs hired from Spofford, and went into the occupation of, two rooms on the *second* floor of the so-called rear or extension building, and since 1874 their said occupation has been continued under successive annual leases. Their present holding is under a verbal letting for one year, from May 1, 1879, upon the terms expressed in a previous written lease, which, however, as is admitted, contained no allusion

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to either a right of way through the hallway in question or to a right to affix signs upon the Broadway front.

Spofford remained in possession of the four buildings connected as aforesaid, until December, 1878, when the premises fronting on Broadway were sold under a judgment for the foreclosure of the Albert and Hickman mortgage, and purchased by the defendant in good faith, and without knowledge of plaintiffs' claims, for the sum of \$58,000. The remaining three buildings, lying and fronting upon Morris street, west of the defendant's building, Spofford retained, and they are still owned by him.

Upon ascertaining, after his bid had been accepted, the condition and use of the premises, and fearing that some right of way might be claimed by Spofford or his tenants, the defendant applied to the supreme court, which had given the judgment of foreclosure, to be relieved from his purchase. At the same time the plaintiff in the action applied to the same court for an order directing the defendant to complete his purchase. The plaintiff gave notice of his application to all the parties who had appeared in the suit, but did not serve the papers on Spofford, who had not appeared. Spofford, however, seems to have had actual notice of both applications. They were heard together, and both decided against the defendant, and the latter thereupon completed his purchase, as he was directed to do, and paid the price bid, and received his deed.

It was not until the defendant had thus completed his purchase, that Spofford first claimed that a right of way through the Broadway building existed; and when, after due notice to Spofford and his tenants, including these plaintiffs, the defendant, having erected new staircases inside of his building, and desiring to utilize part of the hallway to increase the size of the

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main offices in his building, proceeded to close up the opening in his rear wall, he was stopped by the temporary injunction in this case.

The present action is not brought by Spofford, but by the plaintiffs as tenants of Spofford. They show that they are shipping and commission merchants, transacting business at the offices occupied by them as agents of a steamship company known as the "Quebec and Gulf Ports Steamship Company," and running numerous steamers from this port to ports in the West Indies and other places; that frequently more than one hundred persons call at their said offices in the course of a single day to transact business with them, and that free and convenient access to their place of business is a matter of the greatest importance to them. They also allege that Broadway is the principal business street and thoroughfare in the city of New York; that all the important steamship companies transacting business in this city have their offices either on Broadway or the Bowling Green, and that the offices occupied by them are valuable to them only because of the entrance thereto from Broadway. They therefore claim that by virtue of their hiring they are entitled to a right of way through the hall of the Broadway building, and to the right to affix and maintain their signs upon the Broadway front, and that the defendant cannot deprive them thereof, and they show by the affidavit of Spofford that the latter intended to and did give them these rights as far as he could do so.

If these rights exist in favor of the plaintiffs, whose lease is subsequent to the mortgage through which defendant's title comes, and subsequent also to the filing of the *lis pendens* in the foreclosure suit, they must exist to the same extent in favor of every tenant occupying a room, no matter how small, in any one of the three buildings which Spofford retains, and not only in favor of every such tenant now in possession, but also

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in favor of every one who may come in under future leases ; and thus the Broadway building must remain forever subject to the burden which thus rests upon it and materially affects its rental and salable value. For if the rights claimed exist at all, they must exist as easements which are attached to and follow the land, not the person of Spofford, and as such follow parts of the estate into the hands of the respective tenants.

The general rule undoubtedly is, that where an easement is secured to a dominant estate and is designed to benefit the same, in whosoever hands it may be, it will inure to the benefit of the owners of the several parts into which it may be divided, provided the burden upon the servient estate is not thereby enhanced.

At the outset it is important to observe, however, that there being, as was conceded, no right by prescription, the rights claimed must rest in a reservation in some form or way to Spofford at the time of his mortgage to Albert and Hickman in 1873. For since the execution of that mortgage as a conveyance to secure the payment of the sum named therein, Spofford could convey no rights to the plaintiffs but what were subject to the estate created by that instrument.

It is conceded that the mortgage in question conveyed the premises fronting on Broadway, by metes and bounds, in fee, subject only to the conditions of the mortgage, and that it contained no reservation either of a right or way, or of any other right in favor of any of the other premises retained by Spofford ; and as, as a general principle, no reservation is implied in a grant, it would seem to follow, that the rights now claimed are not well founded.

Thus in *Burr v. Mills* (21 *Wend.* 290), where a man had conveyed without reservation part of a tract of land, which was at the time flowed by a mill-dam, belonging to him, and had retained the other part on the stream below, it was held that his right to continue

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to flow the land conveyed was gone. COWEN, J., states the principle as follows: "After having sold the land absolutely, Nathaniel Burr, the testator, had no right of flowing left, which he could devise to his four grandchildren. It can make no difference that there was then a dam built which flowed this land. If a man convey land which is covered by his mill pond, without any reservation, he loses his right to flow it. There is no room for implied reservation. A man makes a lane across one farm to another, which he is accustomed to use as a way; he then conveys the former, without reserving a right of way; it is clearly gone. A man cannot, after he has absolutely conveyed away his land, still retain the use of it for any purpose, without an express reservation. The flowing or the way are but modes of use, and a grantor might as well claim to plow and crop his land. If the mill had been first sold by Nathaniel Burr, to another, it would have been different; for the right of flow would have passed to that other as an incident, and could not then be cut off by the grantor."

The plaintiffs rely, however, upon the principle enunciated by SELDEN, J., in delivering the opinion of the court of appeals in *Lampman v. Milks*, 21 *N. Y.* 505, and upon the reported cases, which, it is claimed, establish a rule similar to that stated in the case first mentioned. Judge SELDEN says: "The owner of real estate has, during his ownership, entire dominion and control over its various natural qualities, and may dispose of and arrange them at will. He may alter the natural distribution of those qualities, so as essentially to change the relative value of the different parts; and may, in a great variety of ways, make one portion of the premises subservient to another. . . .

"The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire

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estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may, at any time, re-arrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to re-distribute the properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if, instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts."

In that case a certain watercourse had been diverted into an artificial channel, thereby freeing from water land, which *in that condition* was sold to the plaintiff, and upon which he had built a barn, and it was held that neither the vendor, nor his subsequent grantee of the remaining portion, could close the artificial channel and thereby again flood plaintiff's land. It was a case, therefore, where the implication of the imposition of a servitude was sustained, not in favor of the grantor, but of the grantee, and hence it is evident that the proposition that a similar implication arises in favor of a grantor and against a grantee, was not involved in the decision of the case so as to become conclusive authority,

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and that Judge SELDEN did not intend thereby that it should be applied to all cases which by possibility might be brought within its broad language. In another part of the opinion he had himself stated the question before him to be as follows: "The precise question in this case is, whether an owner, who, by such an artificial arrangement of the material properties of his estate, has added to the advantages and enhanced the value of one portion, can, after selling that portion with these advantages openly and visibly attached, voluntarily break up the arrangement, and thus destroy or materially diminish the value of the portion sold."

But I am not left to mere inference as to whether the proposition so broadly stated in favor of general reciprocity, was *obiter* or not, for in the later case of *Butterworth v. Crawford* (46 N. Y. 349), in which it was sought to enforce that very doctrine under circumstances which brought it directly before the court, the decision of the case was carefully placed upon a different point and the court expressly announced that it did not propose to decide the question.

I am therefore at liberty to consider the question now before me as one which is open in this State, and which must be dealt with upon principle, rather than upon authority.

In the examination of the doctrine as stated—in both its aspects—by Judge SELDEN, in *Lampman v. Milks*, with a view of supporting it upon principle, the first point which challenges attention is, that the two converse propositions are very unequally supported. So far as it implies an easement in favor of the grantee, it stands upon solid ground, viz.: That no man can derogate from his own grant, and that justice requires that the grant should be construed against the grantor so far as to pass the privileges affixed by himself to the property conveyed. So far as it implies an easement in favor of the grantor, these reasons fail, and

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others must be resorted to. But I cannot see what others there can be, except strict necessity.

True, *Gale and Whately on Easements* claim that the maxim that no man can derogate from his own grant, though insufficient to account for, is nevertheless consistent with the principle, that the obligation is imposed equally on the grantee and grantor. But the value of their statement as an authority must, of course, depend upon, and be measured by the number and weight of the cases which support it.

The numerous cases cited in which the dominant tenement was first conveyed, and the implication enforced in favor of the grantee, and all cases in which the conveyance of both dominant and servient tenements was simultaneous, or the title to both vested simultaneously by operation of law, as, for instance, by descent cast, may, therefore, be at once dismissed.

This leaves for special consideration: *Nicholas v. Chamberlain*, *Cro. Jac.* 121; *Pyer v. Carter*, 1 *Hurls. & N.* 916; *Davies v. Sear*, 7 *L. R. Eq.* 427; *Suffield v. Brown*, 9 *Jur. N. S.* 999; and *Hazard v. Robinson*, 3 *Mas.* 272.

In *Nicholas v. Chamberlain* it was held, upon demurrer, "that. if one erect a house, and build a conduit thereto, in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduits and pipes pass with the house, because *it is necessary and quasi appendant* thereto; and he have shall liberty by law to dig in the land for amending the pipes, or making them new, as the case may require."

Davis v. Sear was a case of way by necessity. The house conveyed contained an arch through which a paved passage-way ran to land and a stable in the rear. The case turned not only on the state and condition of

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the property, but also the notice which the defendant had, at the time of the purchase, and it was held that though the archway, to which he took subject, may not then have been a way of necessity, yet being obviously designed to be one, and bound to become one, and actually becoming one on the completion of a plan for the erection of other buildings in the immediate vicinity, and then in process of erection, a right of way was reserved by implication.

Hazard v. Robinson was a case of watercourses where a right had also survived from a prior user.

In Pyer v. Carter the defendant's house adjoined that of the plaintiff, and the action was for stopping a drain running under both houses. The two houses had formerly been one, and were converted into two by a former owner, who conveyed one to the defendant and afterwards the other to the plaintiff. At the time of the conveyances, the drain existed and was in use for both houses; running first under that of the plaintiff, next under that of the defendant, and then discharging itself into the common sewer. It was proved that the plaintiff might have a drain direct from his house into the common sewer, and it was not proved that the defendant at the time of his purchase knew of the position of the drain. It was laid down by the court that where the owner of two or more adjoining houses conveys one to a purchaser, such purchaser will be entitled to all the benefit of all the drains from the house, and subject to all the drains "*necessarily used*" for the enjoyment of the adjoining house, and that too without any express reservation or grant, inasmuch as the purchaser takes the house "as it is," and that the question as to what is necessarily used, depends upon the state of things at the time of the conveyance, and as matters then stood without alteration. WATSON, B., said: "We think that the amount to be expended in the alteration of the drainage, or in the constructing of

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a new system of drainage, is not to be taken into consideration, for the meaning of the word 'necessity' in the cases above cited and in *Pinnington v. Galland* (9 *Exch.* 1), is to be understood the necessity at the time of the conveyance, and as matters then stood, without alteration, &c., &c."

This case has been much discussed and criticised, and in *Washburn on Easements* (2 ed. p. 68) the learned author, after reviewing the cases on this subject, states that he considers the doctrine of *Pyer v. Carter* confined to cases where a drain is necessary to both houses, and the owner makes a common drain for both, and this arrangement is apparent and obvious to an observer. In *Butterworth v. Crawford* (46 *N. Y.* 349), RAPALLO, J., in delivering the unanimous opinion of the court of appeals, approves of the conclusion reached by Prof. Washburn, and adds: "If *Pyer v. Carter* goes further than that, or, at all events, if it applies to cases where there is no apparent mark or sign of the drain, it is not in accordance with the current of the authorities."

In *Suffield v. Brown* (9 *Jur. N. S.* 999), the owner of a dock adjoining a wharf, claimed as an easement that the bowsprits of vessels in the dock might project over the wharf. The master of the rolls had granted an injunction on the ground that the wharf and the dock had been once owned, and so used, together, by the common grantor of both parties.

But Lord Chancellor WESTERBURY, in 1864 (10 *Jur. N. S.* 111) reversed the decree, declaring the law on this branch of the case in the following language: "Assuming that the vendor had been in the habit, during his joint occupation of both properties, of making the coal wharf subservient in any way to the purposes of the dock, one would suppose that the right to do so was cut off and released by the necessary operation of an unqualified sale and conveyance of the

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subservient property. It seems to be more reasonable and just to hold that, if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by the fiction of an implied reservation."

In the course of his opinion the learned lord chancellor declares that *Pyer v. Carter* is not good law, so far as it seems to establish an implied reservation against a man's own grant, and he also repudiates the doctrine asserted by *Gale & Whately*, viz.: that the obligation is imposed equally on the grantee and the grantor, and that it is immaterial which of the two tenements is first granted, whether it be the quasi-dominant or quasi-servient tenement, in the following language: "But I cannot agree that the grantor can derogate from his own absolute grant, so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of the grantor."

Thus *Suffield v. Brown*, as finally decided by the lord chancellor, is in perfect harmony with *Burr v. Mills* (21 *Wend.* 292), already referred to, and consistent with the point actually decided in *Lampman v. Milks* (21 *N. Y.* 505), and although subsequently, in *Davies v. Sear* (7 *L. R. Eq. C.* 427,) the same master of the rolls (Lord ROMILLY) who had originally granted the injunction in *Suffield v. Brown*, repeated the assertion that it is immaterial whether the dominant or the servient tenement is conveyed first, it is evident that his assertion cannot override the direct decision of the lord chancellor, his superior, which remains unreversed. Besides, as already shown, *Davies v. Sear* went upon the question of the way being a way of necessity.

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The next point to be considered is, that all easements and servitudes do not stand upon the same footing.

In *Lampman v. Milks* (*supra*) SELDEN, J., says : " It is not every species of easement which passes as a matter of course by the conveyance of one of two tenements, or part of a single tenement, by the owner of both or the whole. Easements, or servitudes, are divided by the civil code of France into continuous and discontinuous. Continuous are defined to be those, of which the enjoyment is, or may be, continual, without the necessity of any actual interference by man ; as a water-spout, or right to light or air. Discontinuous are those, the enjoyment of which can be had only by the interference of man ; as rights of way, or a right to draw water.

" Servitudes are also divided, by the same code, into 'apparent' and 'non-apparent.' The analogy between the common law and the French code, in this respect, would seem to indicate, as suggested by Messrs. Gale & Whately, a common origin. The substance of those divisions may be distinctly traced in the common law cases ; and it will be found that those easements which, according to this classification, are termed *discontinuous*, pass upon a severance of tenements by the owner only when they are *absolutely necessary* to the enjoyment of the property conveyed. Gale & Whately, after stating the grounds upon which easements are held to pass in such cases, says : ' This reasoning applies to those easements only which are attended by some alteration which is, in its nature, *obvious and permanent* ; or, in technical language, to those easements only which are apparent and continuous ; understanding, by apparent signs, not those which must necessarily be seen, by those which may be seen or known, on a careful inspection by a person ordinarily conversant with the subject' (*Gale & Whately on Easements*, 40)."

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Of course, a right of way may, in an exceptional case, especially if indicated by an artificial structure of a permanent character, constitute an apparent and continuous easement. But as a general rule, rights of way are in their nature discontinuous and non-apparent, unless strictly and obviously necessary, and the distinction between rights of way and other easements which from their nature may be deemed necessary, is therefore recognized by many cases, including *Lampman v. Milks*.

For these reasons, and the further one that a right of way arises only from the effect of the grant or reservation of the land itself, provided there is no other way of access to the same, it has always been held, and the law seems to be now settled beyond controversy, that, in the language of the court in *McDonald v. Lindall*: "The right of way from necessity over the land of another is always of *strict necessity*, and this necessity must not be created by the party claiming the right of way. It never exists where a man can get to his property through his own land. That the way through his own land is too steep or too narrow, does not alter the case. It is only where there is no way through his own land that the right of way over another can exist. That a person claiming a way of necessity has already one way, is a good plea, and bars the plaintiff" (*McDonald v. Lindall*, 3 *Rawle*, 492; *Stuyvesant v. Woodruff*, 1 *Zab.* 113; *Felters v. Humphreys*, 3 *C. E. Green*, 260). Or, as stated by another class of cases, a right of way exists only where the person claiming it has no other means of passing from his estate into the public street or road (*Gayetty v. Bethune*, 14 *Mass.* 49; *Grant v. Chase*, 17 *Id.* 443; *Smyles v. Hastings*, 22 *N. Y.* 217; *Collins v. Prentice*, 16 *Conn.* 39; *Hyde v. Jamaica*, 27 *Vt.* 448).

Nor would the rights of a grantor be any more extensive or different, though by the terms of his deed he reserved to himself "a way of necessity" (*Viall v.*

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Carpenter, 14 *Gray*, 126); and *Washburn on Easements* shows by quite an array of authorities that the right of way of necessity is so limited in respect to its duration, that, though it remains appurtenant to the land in favor of which it is raised, so long as the owner thereof has no other mode of access, yet the moment the owner of such a way acquires, by purchase of other land or otherwise, a way of access from a highway over his own land to the land to which the way belongs, the way of necessity is at an end; or, in other words, a way of necessity ceases as soon as the necessity ceases.

From the examination so far made, which included many cases which I do not deem it necessary to mention specifically, I am satisfied that the true rule of law is as follows: Where the owner of two or more tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold, with all the benefits which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. But no burden or servitude can be imposed by the vendor upon the tenement, or portion sold, in favor of the property retained by him in derogation of his grant, without a reservation expressed in the grant, unless an apparent sign of servitude exists on the part of the tenement, or portion, sold, in favor of the property retained, and the easement claimed is strictly necessary to the enjoyment of the property retained. In the latter case visibility and strict necessity must both concur, as in the case of a party wall, and especially in the case of a claim of right of way.

The rule being as stated, the plaintiffs cannot succeed upon this motion. Not only was there no reservation, but it also clearly appears, and on their own showing, that access can be had to the buildings retained by Spofford, and through them to their offices, from Morris street; and also that, at a comparatively

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small expense, additional, direct and perfectly abundant communication between said street and their offices can be established by the construction of an interior staircase from the ground floor to the second floor of the building in which the said offices are situated. In view of these facts the right of way claimed did not spring into life upon the severance of Spofford's property in favor of the property retained by him, and the plaintiffs can claim no such right.

The element of necessity being wanting, it is not enough that, as claimed by the plaintiffs, apparent signs of servitude existed at the time of the execution of the Albert and Hickman mortgage. Nor is it necessary to determine whether such signs as did exist, really constituted apparent signs of servitude, within the rule laid down by the authorities, or were just as insufficient to create an apparent easement, as the gate was held to be in *Stuyvesant v. Woodruff* (1 Zab. 133), or the carriage way in *Pheysey v. Vicary* (16 M. & W. 484), or the alley-way in *Felters v. Humpheys* (3 C. E. Green [N. J.] 260).

The right claimed to affix and maintain signs upon the Broadway front of defendant's building, if not still more indefensible, stands upon the same footing as the right of way claimed, even when considered as an independent right, and not merely as one which is incidental as a guide to an existing right of way. If it survived a severance, it would, as tenants would move into or out of the buildings retained by Spofford, necessitate a periodical putting up and taking down of signs of various forms, sizes and appearances, and consequently involve often recurring changes in the appearance of the front itself. This the law would permit, even in case of a general reservation, only upon proof that the burden upon the servient estate was not increased thereby beyond the extent reserved. And in

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the absence of a reservation it can be sustained only upon proof of strict necessity as well as visibility.

But I cannot see how, in a case like the present, it can be said that the existence of the right claimed is necessary to the enjoyment of the demised premises. The plaintiff's tenement is bounded by its four walls, and though for the transaction of their business therein it may be more advantageous, or even necessary, that the premises occupied by them should appear to be Broadway property, yet such a requirement on the part of their business does not in any legal or proper sense constitute a necessity for the proper enjoyment of the premises. Matters necessary for the proper enjoyment of demised premises, and matters necessary for the profitable transaction of a certain business therein, are altogether different things. Between landlord and tenant no contract or warranty on the part of the landlord, that the premises demised shall be or continue fit for the tenant's business, is ever implied from the mere fact of letting. None can therefore be implied against Spofford, from the mere fact that he rented to the plaintiffs the offices occupied by the them. How then can such an implication arise against the defendant, whose position is still stronger? If the plaintiffs stand so much in need of premises fit for the purposes of business usually transacted on Broadway, they should be left to secure them directly.

Upon the whole case, therefore, it clearly appears that the plaintiffs, as tenants whose rights are in all respects subsequent and subject to those acquired by the defendant under the sale of foreclosure, possess no right of easement, or any other right sufficient to maintain the action against the defendant, and that, if Spofford expressly contracted, but failed, to give them any such right, their remedy is against Spofford personally. Having reached that conclusion in the course of the examination already made, it is unnecessary to

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consider the further point pressed, and argued with great ability on the part of the defendant, that the question involved in this motion is *res adjudicata* between the parties by reason of the decision of the supreme court by which the defendant was compelled to complete his purchase.

The motion of the plaintiffs for the continuance of the injunction should be denied, and the preliminary injunction dissolved, with \$10 costs.

Opinion of VAN VORST, J.

MEMORANDUM CASES.

THE FARMER'S AND MECHANIC'S NATIONAL
BANK OF BUFFALO, PLAINTIFF AND RE-
SPONDENT, v. JOSEPH M. HAZELTINE, ET AL.,
DEFENDANTS AND APPELLANTS.*

Before VAN VORST and SPEIR, JJ.

Decided March 3, 1879.

Appeal by defendants from judgment and order denying motion for new trial on the minutes.

C. Van Santvoord, attorney, and of counsel, for appellants.

Fithian & Clark, attorneys, and *Freeman J. Fithian*, of counsel, for respondent.

VAN VORST, J., wrote for affirmance with costs, holding in substance:—This case involves the same principles as are presented in *Farmer's & Mechanic's National Bank of Buffalo v. Logan*, 74 *N. Y.* 568, and in *Farmer's & Mechanic's National Bank of Buffalo v. Atkinson*, *Id.* 587. The points urged by counsel for appellants are fully answered by the opinions in those cases. The maxim, *nemo dat quod non habet*, applies.

SPEIR, J., concurred.

* Decision in this case affirmed by the court of appeals, September 16, 1879; see 9 *N. Y. Weekly Dig.* 8; also see 43 *Super. Ct.* 546.

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ELIAS PONVERT, PLAINTIFF AND RESPONDENT, v.
AUGUST BELMONT, DEFENDANT AND APPELLANT.

Before VAN VORST and SPEIR, JJ.

Decided March 3, 1879.

Appeal by defendant from judgment entered on report of referee.

Joseph Larocque, for appellant.

J. S. Lawrence, for respondent.

VAN VORST, J., wrote for affirmance with costs, holding substantially, as follows:—The justice of the plaintiff's claim has been established by the general term of this court in *Ponvert v. Belmont* (42 *Super. Ct.* 531). The error of the referee on the former trial has been corrected on the new trial; in other respects, the judgment is as it was before. Appellant's exceptions to rulings of referee do not call for interference with judgment.

SPEIR, J., concurred.

WILLIAM J. BURNETT, PLAINTIFF AND RESPONDENT, v. G. BROWN SNYDER, IMPEADED, &C.,
DEFENDANT AND APPELLANT. (ACTION No 1.)

I. PARTNERSHIP.

1. WHAT WILL CONSTITUTE.

- (a) An agreement was made between several, that certain of their number should be named as copartners in partnership articles.

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and that the others should have a certain proportion of the interest of certain of those so named, which agreement was carried into effect.

Held,

it appearing that it was the mutual desire of all that those not named in the articles should be interested as partners; and that it was their common opinion that the interest of the firm would be best subserved by those, not to be named in the articles, not appearing to the world to be partners; and it also appearing that the above mode was adopted to accomplish the desired result:

THAT

it was the intent of all the parties, including Snyder, that he should, as between themselves, have the interest of a partner; and that the form of the written contracts drawn and executed could not prevent the liability of a partner attaching to Snyder, as between him and third persons dealing with the firm, while this relation existed.

1. SUB-PARTNERSHIP. Such an arrangement *does not present a case* where, after the firm is formed, one partner forms a sub-partnership, which, when it becomes known to the others, is neither approved nor disapproved of by them, *as was the case in Burnett v. Snyder, 43 N. Y. Super. Ct. 238.*

II. LIMITATION, STATUTE OF.

1. PAYMENT ON ACCOUNT by one partner after firm has gone into liquidation.

(a) *Effect on another partner.*

1. S., being liable for the debts of a firm, whether as a partner *inter se* or *quoad* third persons, after the firm went into liquidation, gave to a partner of the firm an amount of money, to be applied by him towards the payment of the debts of the firm, such partner agreeing to pay the debts in full; such partner made a part payment on a claim against the firm.

HELD,

sufficient to take the case out of the statute of limitations as to S.

1. *This, though the claimant may have received no part of the identical money furnished by S.; and though the whole of the money so furnished may have been applied to the payment of other firm liabilities before any payment on the claims in suit.*

2. RESIDENCE.

(a) Remarks of referee on.

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Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided March 3, 1879.

This action was brought against C. Brown Snyder, as partner in the firm of Strang, Platt & Co., to recover an indebtedness due plaintiff from that firm. The principal questions involved were whether he was liable as a partner, and whether the claim was not barred by the statute of limitations.

Strang, Platt, Ryley, Sexton and Snyder being mutually desirous that Sexton and Snyder should be interested as partners in two firms to be formed, one to do business at New York under the name of Strang, Platt & Co., and the other to do business at Boston, under the name of George W. Ryley & Co., and being of the common opinion that the interest of the firms would be best subserved by Sexton and Snyder not appearing to the world to be partners, adopted a mode to accomplish the desired result, which mode was the preparation and execution of articles of copartnership to be signed by Strang, Platt, and Ryley, in which they alone were named as partners, and that Sexton should have half of the interest of Platt, and Snyder have half of Ryley's interest; separate agreements to be entered into between Sexton and Platt and between Ryley and Snyder. Under the terms of the formal partnership, Strang had one-fifth, Platt two-fifths, and Ryley two-fifths. Sexton had one of Platt's two-fifths, Snyder had one of Ryley's two-fifths. They each had a fifth interest.

In 1864, Sexton's interest ceased, his part of the accrued profits were transferred by him to Snyder, to pay some indebtedness of his to Snyder, and then a new agreement by parol was made between Strang, Platt, Ryley and Snyder, by which the business was to be continued as previously, and that Platt should have

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one-fourth, Strang one-fourth, and Ryley one-half of the profits, and that Snyder should have one of Ryley's quarters, thus giving each of the four a quarter of the profits.

Ryley died in June, 1867. Pursuant to agreement between Mr. Platt, Mr. Strang, Mr. Snyder, and the administratrix and administrator of Ryley, the business was continued until December 31, 1869, or January 1, 1870.

A new firm was then formed, under the same firm name, to continue and transact the same business. In that firm Snyder's interest was continued, he having a share of the interest of Ammon Platt and of Strang therein. That was dissolved in or about the following April by the death of Ammon Platt. A new firm was then formed, commencing about May 1, 1870, under the same firm name, to continue and transact the same business, and Snyder was also interested in the business and profits of that firm. That continued until it went into liquidation.

In 1874, it became necessary to provide means to pay the debts of the three firms, and more especially of firms No. 1 and No. 2.

A summary statement of the aggregate amount of the liabilities of the three firms was furnished by Strang to Snyder, being, as then stated, about \$104,000. The liabilities proved to be somewhat larger, by reason of losses accruing on leases taken in Boston. After discussion and consideration, Snyder furnished to Strang \$50,000 in funds and credits, to be applied by him in paying the liabilities of these three firms, and Strang agreed with Snyder to pay them in full. Under this arrangement Strang paid to the plaintiff, October 10, 1874, on account of what Strang, Platt & Co. owed the plaintiff, the sum of \$5,141.31.

Upon the question of the statute of limitations the referee held:

"This payment of \$5,141.31, on account of the debt

Statement of the Case.

owing to the plaintiff, operates to prevent the debt being barred by the statute of limitations. It was not only made by the consent and authority of Snyder, but it would have been a breach of faith on the part of Strang if he had not applied the \$50,000 in payment of debts owing by the firm, or had not paid that amount by reason of having received that sum. I do not think the fact that the plaintiff may have received no part of the identical \$50,000, furnished by Snyder, or that Strang may have actually paid \$50,000 of the firm's liabilities before he paid to the plaintiff the \$5,141.31, affects the question of the force and effect of this payment, as a part payment on account. It was a part of the agreement between Strang and Snyder that Strang should pay not only a part, but the whole of each debt. And in making such payments, Strang did what Snyder not only required he should do, but required him to contract that he would do."

The referee reported in favor of plaintiffs. Upon his report judgment was entered; and defendant, Snyder, appealed.

Wilson & Wallis, attorneys, and of counsel, for appellant.

Martin & Smith, attorneys, and *A. P. Whitehead*, of counsel, for respondent.

PER CURIAM.—The judgment should be affirmed, on the opinion of the referee.

WILLIAM J. BURNETT, PLAINTIFF AND RESPONDENT, v. C. BROWN SNYDER, DEFENDANT AND APPELLANT. (ACTION No. 3.)

TRIAL.—OBJECTIONS, WHEN TO BE TAKEN.

In this case the objection that no demand had been proved, was not raised at the trial, but the existence of the fact, if material, seems to have been assumed by all parties, and by the referee.

The defendant, on filing exceptions to the report, sought to raise the point after the final disposition of the issues. *Held*, that, as the objection was capable of being obviated by proof, if it had been taken at the proper time, it should have been distinctly taken at the trial. Not having been taken then and there, it is not available on appeal.

Before CURTIS, Ch. J., and SEDGWICK and FREEDMAN, JJ.

Decided March 8, 1879.

Appeal from judgment in favor of plaintiff, entered upon the report of a referee.

Wilson & Wallis, attorneys, and *William G. Wilson*, of counsel, for appellants.

Martin & Smith, attorneys, and *Aaron P. Whitehead*, of counsel, for respondent.

FREEDMAN, J., wrote for affirmance, with costs, holding as above; and as to all other questions concurring with the views of the referee.

SEDGWICK, J., concurred.

Statement of the Case.

DAVID WOOLF, PLAINTIFF AND RESPONDENT, v.
AARON JACOBS, IMPLEADED WITH ANOTHER,
DEFENDANT AND APPELLANT.

II. ATTORNEY'S LIEN.

1. Attachment for contempt.

(a) LIEN OF ATTORNEY UPON FINE IMPOSED BY WARRANT OF ATTACHMENT PROTECTED.

Before VAN VORST and SPEIR, JJ.

Decided March 8, 1879.

This was a motion to vacate a warrant of attachment issued against defendant, Jacobs, committing him to jail for thirty days, for a contempt of court in violating an injunction contained in an order for his examination as a judgment debtor, issued after execution returned, by *transferring certain* of his property, and fining him \$2,740.54, and ordering him to stand committed until said fine should be paid.

From the face of the warrant it appeared that this sum of \$2,470.54 was composed as follows: \$2,068.69, part of the amount remaining due on the judgment; \$252.25, costs of expenses of the proceedings to punish for contempt; \$250, counsel fees in such proceedings; it also appeared that the property transferred was of the value of \$2,068.29.

The warrant was issued December 17, 1874. Upon the motion it appeared that plaintiff, after the issuing of the warrant, assigned the judgment, and that the assignee had satisfied it of record, and that, at the time of the assignment, plaintiff, for the consideration of \$1, released the defendant, Jacobs, from the fine and all liability by virtue thereof; it also appeared that the defendant had been actually imprisoned under the warrant for over thirty days.

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It also appeared that the costs and allowance fixed in the judgment amounted to \$2,779.49; that plaintiff's attorney had expended large sums of money for disbursements, and had been paid nothing, either on account of his disbursements or of his services; and that plaintiff's attorney served a notice of lien on the judgment and attachment proceedings upon the defendant's attorney, prior to the aforesaid assignment and release.

The motion was denied at special term. From the order entered on said denial defendant appealed. The real respondent was plaintiff's attorney.

Samuel J. Crooks, counsel, for appellant.

C. Bainbridge Smith, counsel, for respondent.

PER CURIAM.—The order must be affirmed with costs.

ADOLPH E. FLAMANT, PLAINTIFF AND APPELLANT, v. S. W. WOOD, DEFENDANT AND RESPONDENT.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided March 3, 1879.

Appeal from order denying plaintiff's motion for leave to amend the complaint.

W. D. Hennen, for appellants.

E. J. Pattison, for respondents.

PER CURIAM.—The order should be affirmed, with costs.

Statement of the Case.

BENEDICT ESS, PLAINTIFF AND RESPONDENT, v.
CLARA ESS, DEFENDANT AND APPELLANT.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided March 3, 1879.

This was an action for a limited divorce on the ground of cruel treatment. The answer denied the allegations of the complaint, set up cruel treatment by plaintiff, and asked for a limited divorce in defendant's favor.

The cause was tried before a referee, who found in plaintiff's favor. Judgment of divorce *a mensa et thoro* in favor of plaintiff, and awarding him the custody of the children, was entered on the report.

PER CURIAM.—The order and judgment should be affirmed.

CHAUNCEY KILMER, PLAINTIFF AND APPELLANT,
v. SAULSBURY L. BRADLEY AND ———
SMITH, ET AL., DEFENDANTS AND APPELLANTS.

I. Injunction.

1. PROSECUTING AN APPEAL, INJUNCTION AGAINST DENIED.

1. A plaintiff has no right to prevent an appeal, unless the appellant party, in a formal and effective way, surrenders to the plaintiff his right to appeal.
2. If there is any good reason to question the validity of an appeal, it should be done by motion in the action in which the appeal is taken.
3. The facts, that the interests of another defendant will be promoted by the appeal, and that such other defendant is aiding in its prosecution, will not justify an injunction, whatever may be the status of such other defendant, as to an appeal in his own behalf.

Opinion PER CURIAM.

Before SEDGWICK and VAN VORST, JJ.

Decided March 14, 1879.

This was an action for an injunction to restrain defendant Smith and his attorney from prosecuting an appeal taken in an action between the plaintiff and defendants Bradley and Smith. This plaintiff claimed that Smith had expressed a determination not to appeal, and that he was afterwards induced to do so by his co-defendant, Bradley, who desired an appeal to be taken to promote his own interest, and who was aiding in the prosecution of Smith's appeal.

Judgment passed against the plaintiff, and he appealed.

PER CURIAM.—We fail to discover, in the facts alleged in the complaint, any sufficient ground for this action. If there was any good reason to question the validity of the appeal of Smith, it could have been well and sufficiently done by motion in the original action. But aside from that, the defendant Smith had a legal right to appeal from the judgment, and take measures to reverse it if he could. He had also a legal right to have other attorneys substituted in the place of those who had formerly served him to prosecute his appeal. And this is all that has in fact been done, and of that the plaintiff has no just ground of complaint. If Smith, in his own mind, had at any time determined to abandon the case, he was not precluded from revising his determination, and perfecting his appeal. The plaintiff gained no right to prevent an appeal, until Smith formally, and in an effective way, surrendered to the plaintiff his right to appeal. This was not done. There is no reason why Smith or his attorneys should be restrained. They are but exercising unquestionable legal rights.

If the interests of Bradley are promoted by Smith's

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appeal, this cannot effect his right to do what he has done. Nor is the fact that Bradley is aiding in the prosecution of Smith's appeal, so long as Smith is proceeding in the exercise of a legal right, any ground for restraining him.

Judgment appealed from affirmed with costs.

JOHN J. CORBETT, PLAINTIFF AND RESPONDENT,
v. LOUIS DE COMEAU, DEFENDANT AND AP-
PELLANT.

DISBURSEMENT FOR PRINTING—WHEN DISCRETION OF COURT AS TO
WILL NOT BE DISTURBED.

The defendant herein presented to the clerk, upon taxation of his costs, &c., upon a successful appeal, an item of \$28.80 for printing case and points, which was objected to by plaintiff as excessive and unnecessary. Defendant presented, in answer, the receipted printed bills and the usual affidavit, and the clerk overruled the objection. Plaintiff thereupon obtained an order to show cause why the taxation should not be set aside, and upon the hearing it was ordered that that the amount should be reduced to \$18.00, from which order defendant appeals. *Held*, that the discretion of the judge below in fixing the amount to be allowed as a disbursement, should not be interfered with; also, that the order was not appealable.

Before SEDGWICK and VAN VORST, JJ.

Decided March 14, 1879.

Appeal from order entered at special term, reducing defendant's disbursements for printing case and points on appeal.

Coudert Brothers, for appellants, urged :—I. There is no practice to justify such a motion as was made by the plaintiff. The remedy was by appeal, which should

Statement of the Case.

have been founded on the same papers (Logan v. Thomas, 11 *How. Pr.* 160; People v. Oaks, 1 *Id.* 195).

II. It is obvious that the learned judge below made his order on the theory that the successful brief complained of by plaintiff's attorney was too long. There was no pretense that the plaintiff had not paid the full amount charged. As to allowance for printing, see *Consalus v. Brotherson*, 52 *How. Pr.* 62; *Potter v. Carpenter*, 56 *Id.* 89.

Frank W. Severance, for respondents, urged:—

I. The order is not appealable. It is a discretionary order. The judge saw fit in his discretion to reduce this item of disbursements, and a general term will not interfere.

II. This lengthy brief, containing, as it does, mostly matter which might be proper as an oral or printed argument, is in no sense points. "Points" are a concise statement of what a party considers the law, with a citation of authorities, and not an argument *in extenso* (See *Gray v. Schenck*, 3 *How. Pr.* 231, holding that it will not be allowed as a disbursement).

PER CURIAM opinion for dismissal of appeal with ten dollars costs.

JOHN J. CORBETT, PLAINTIFF AND RESPONDENT,
v. LOUIS DE COMEAU, DEFENDANT AND AP-
PELLANT.*

The order appealed from denies defendant's motion to compel plaintiff's attorney to furnish "a sworn statement showing residence, occupation, and present address of plaintiff, &c.," that the defendant might be enabled to examine the plaintiff before trial. It ap-

* See *post*, p. 637.

Opinion PER CURIAM.

peared from the moving papers that the complaint was not served, plaintiff's proceedings being stayed. *Held*, that no substantial right was necessarily involved in the denial of the motion and the case failed to disclose any exigency which demanded the order. At most the matter rested in the discretion of the judge below.

Before SEDGWICK and VAN VORST, JJ.

Decided March 14, 1879.

Appeal by defendant from order, &c.

Coudert Brothers, for appellant.

Frank W. Severance, for respondent.

PER CURIAM opinion for dismissal of the appeal with ten dollars costs.

JOSEPH PATRICK, PLAINTIFF AND RESPONDENT,
v. DAVID SOLINGER, ET AL., DEFENDANTS
AND APPELLANTS.

Before SEDGWICK and VAN VORST, JJ.

Decided March 14, 1879.

This is an appeal from a judgment against the defendants, entered on the verdict of a jury.

The action was for conversion.

Henry Steinert, for appellants.

James Henderson, attorney, and *S. Jones*, of counsel, for respondent.

PER CURIAM.—Judgment and order appealed from affirmed with costs.

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MARY GROGAN, PLAINTIFF AND APPELLANT, v.
NEW YORK & H. RAILROAD COMPANY,
DEFENDANT AND RESPONDENT.

Before SEDGWICK and VAN VORST, JJ.

Decided March 14, 1879.

L. G. & R. L. Garrettson, attorneys, and *Homer A. Nelson*, of counsel, for appellants.

Chauncey M. Depew, attorney, and *Elliott F. Shepard*, of counsel, for respondent.

PER CURIAM.—Judgment and order appealed from affirmed with costs.

LOUIS SILVERSTEIN, PLAINTIFF AND APPELLANT,
v. PAMELA L. VULTE, DEFENDANT AND RE-
SPONDENT.

II. *Practice.*

1. RESETTLING FINDINGS OF LAW.

(a) Order denying motion for, affirmed.

Before SEDGWICK and VAN VORST, JJ.

Decided March 14, 1879.

The case was tried before one of the judges of this court, who delivered an opinion and made and filed his findings of fact and law.

Plaintiff, claiming that the findings of law were not in accordance with the facts found and the opinion, moved before another judge for a re-settlement, which motion was denied.

Statement of the Case.

Christopher Fine, of counsel, for appellant.

Albert Mathews, of counsel, for respondent.

PER CURIAM.—Order affirmed with \$10 costs and disbursements.

D. OGDEN MILLS, PLAINTIFF AND APPELLANT, v.
JOHN M. WATSON, IMPEADED, &C., DEFEND-
ANT AND RESPONDENT.

I. *Extra allowance.*

1. WHEN MAY BE GRANTED.

(a) On the dismissal of complaint for non-appearance of plaintiff when the cause is called for trial.

2. MOTION FOR, WHEN MAY BE MADE.

(a) May be made at a special term for the hearing of motions.

3. APPEALABILITY OF.

(a) Order granting may be appealed from to the general term.

4. ELEMENT IN GRANTING, WHAT IS NOT A NECESSARY ONE.

(a) The fact of a trial having taken place is not.

Before SEDGWICK and VAN VORST, JJ.

Decided March 14, 1879.

Prior to May, 1876, the plaintiff had taken an assignment of a bond and mortgage made by one Charles L. Cornish.

In September, 1876, the premises were sold in foreclosure, and a judgment for deficiency was obtained against said Cornish for \$36,129.18.

Cornish was examined in supplementary proceedings, and swore that the defendant Watson had one-sixth interest in the purchase at the time of the purchase, and had paid for his interest before Cornish took the title. They were general speculators in real estate.

Appellant's Points.

Thereupon the plaintiff commenced an action against the defendants by a complaint, to recover against them as partners, under the authority of *Williams v. Gillies*, 13 *Hun*, 422; *Coleman v. Eyre*, 45 *N. Y.* 38.

The defendant Watson amended his answer, setting up the foreclosure judgment as a bar.

In the month of October, 1878, the case was first reached on the calendar, and inasmuch as the case of *Williams v. Gillies*,—the decision of which would determine the recovery in this case,—had been argued in the court of appeals, and that court had taken a recess until early in November, the case was, on plaintiff's application, marked off, and was not again reached until January.

The case of *Williams v. Gillies* was decided by the court of appeals in November, 1878. That court reversed the decision of the court below. The doctrine laid down by the court of appeals was conclusive against plaintiff's right of recovery in this action. The counsel for both plaintiff and defendant were aware of this. Efforts were made to procure a discontinuance of the action on terms mutually satisfactory. They were unsuccessful, and finally the cause was, on January 13, 1879, called for trial at July trial term, and, no one appearing for plaintiff, the complaint was dismissed with costs as to defendant Watson. No motion was at this time made for an extra allowance. Thereafter, on February 3, 1879, Watson noticed a motion for an extra allowance, to be heard on February 11, 1879, at a special term for the hearing of motions.

The court, at special term, granted an allowance of \$1,806.46, being five per cent. of \$36,129.18, the amount of plaintiff's claim.

From the order entered on this decision plaintiff appealed.

D. M. Porter, of counsel, for appellant.—I. This

Appellant's Points.

order is appealable to the general term, and it is proper for the general term to take cognizance of it, and examine it on the merits (*People v. New York Central R. R. Co.*, 29 *N. Y.* 418, 422; *Clark v. City of Rochester*, 29 *How. Pr.* 97; *Gori v. Smith*, 6 *Robt.* 563; *Commissioners of Pilots v. Spofford*, 3 *Hun*, 57).

II. The court cannot give more than sufficient to indemnify the party for his expenses in the action upon the facts appearing upon the application (*People v. New York Central R. R. Co.*, *supra*). Neither can an extra allowance be granted by a judge who did not try the action, unless the amount of expense is stated in the moving affidavits (*Ib.*). "It should be shown not only what the expenses are for which the further allowance is claimed, but also that they have been necessarily, reasonably, and fairly incurred in reference to the trial" (*Ib.*).

III. Counsel well knew that the case of *Williams v. Gillies* was controlling, and that it had been decided adversely to the plaintiff's position, and that no recovery could be had by the plaintiff after the court of appeals had decided that such an action could not be maintained, and consequently, expenses could not be reasonably, nor fairly, nor necessarily made or incurred—especially when Mr. Knickerbacker went to Mr. Watson to get a discontinuance, he was told that the plaintiff could not recover because of the decision in the court of appeals of *Williams v. Gillies* (*Eldridge v. Strenz*, 7 *Jones & Spencer*, 295). Defendant has not shown the amount of any extra expenses incurred; therefore the order granting an extra allowance was improperly made. The allowance of \$1,806.46 was, in any event, exorbitant and unwarranted by the facts. What would have been allowed if the cause had been tried? "The application should be made at the circuit, at which the case was tried, or to the justice who held the same, and to none other" (*Supreme Court Rule*, 47

Respondent's Points.

(3); *Saratoga & Washington R. R. Co. v. McCoy*, 9 *How. Pr.* 339; *Dyckman v. McDonald*, 5 *Id.* 121).

B. F. Watson, of counsel, for respondent.—I. The order appealed from is not appealable (*Code of Pro.* § 309; Opinion of HOGEBOM, J., dissenting, in *People v. New York Central R. R. Co.*, 29 *N. Y.* 429, 430). There is no direct authority for the position that such discretion is reviewable at the general term. Should the case of *People v. New York Central R. R. Co.*, 29 *N. Y.* 418, cited *supra*, be relied on therefor, it may be replied, that in that case the court of appeals merely decided that an order of the kind appealed from was appealable to the general term, that the action of the general term in dismissing the appeal was wrong, and consequently reversed the order of dismissal, without, however, in reality, deciding, or being able to decide anything as to what should be the action of the general term in considering the appeal on its merits. At the close of the opinion in the case of *Southwick v. Southwick* (49 *N. Y.* 510), the court say: "This court cannot review the action of the court below in making an extra allowance to the defendant in addition to his taxable costs. It does not appear to have exceeded the maximum limit fixed by the Code" (See also *Krekeler v. Ritter*, 62 *N. Y.* 372; *Stokes v. Dickenson*, 5 *Sandf.* 663; *Burhans v. Tibbits*, 7 *How. Pr.* 74; *Dickenson v. McElwain*, 7 *Id.* 138; *Wilkenson v. Tiffany*, 4 *Abb. Pr.* 98; *Union Bank v. Mott*, 13 *Id.* 247).

II. A trial is not a necessary element for the granting of an extra allowance when a defense has been interposed in a difficult and extraordinary case (*Coffin v. Coke*, 4 *Hun*, 618). This case required great care and previous preparation by counsel to be ready to prove and argue to this court, not only that that decision was wrong in principle, and not sustained by authority (all of which labor was incurred and preparation made

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before the announcement of said reversal), but also that the facts in the case at bar did not bring it within the principle of that decision.

III. In answer to this objection, it is sufficient to say that the general term of this court has held that the motion is properly made at special term, and need not necessarily be before the same judge (*Gori v. Smith*, 3 *Abb. Pr. N. S.* 51).

PER CURIAM.—Order appealed from modified by reducing the amount of the allowance to \$750.

DAVID B. LEE, PLAINTIFF AND APPELLANT, v.
JOSEPH GARGULIO, ET AL., DEFENDANT AND
RESPONDENT.

**BROKERS—WHEN PRINCIPAL NOT RELIEVED OF LIABILITY TO, BY
REASON OF SUBSEQUENT GUARANTY MADE BY THIRD PARTY.**

The counter-claim herein averred that the defendants were the brokers of the plaintiff in the purchase of certain stock, and further alleged, by specific averments, that by their subsequent dealings with said stock at the plaintiff's request, he became indebted to them in the sum of \$8,937, with commissions, which had been demanded.

The plaintiff, while admitting his liability originally, sought to avoid it, upon the ground that it was to be implied, from a guaranty subsequently made by one Fitler, and from the other facts in the case, that he should in no event be liable to pay to defendants any loss which should accrue upon the sale or repurchase of said stock, or upon the sale of any stock that should be re-purchased in the place thereof.

The guaranty in question was inclosed in a letter to defendants, which began:

"Yours, notifying me of acceptance of my offer by customer at 35, at hand. I accept his conditions as set forth in your letter, and inclose guaranty, &c." The guaranty inclosed was in these words: "For and in consideration of one-half the profit

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on 800 shares, &c., I hereby guarantee the holder of said 800 shares against all or any loss whatsoever, and further agree, in case of decline of said stock, below 35, to deposit margin, if called on to do so, to cover all or any decline as fast as it may be made in said stock. Orders to sell and re-purchase said 800 shares, or any part thereof, to be given exclusively by me, the undersigned, for a period of sixty days from the date hereof."

Held, by the court, that the defendant, in assenting to the operation of the above, and agreeing to act upon it, did not thereby release the plaintiff from his liability on the original agreement. No fact was accomplished by the guaranty, which was inconsistent with the first arrangement.

There being nothing else in the testimony sufficient to make an issue as to the counter-claim, the direction of a verdict for defendant was properly made.

Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

Appeal from judgment entered on verdict for defendant under the direction of the court.

Stickney & Shepard, attorneys, and *Albert Stickney*, of counsel, for appellants.

Wetmore & Jenner, attorneys, and *Edmund Wetmore*, of counsel, for respondents.

SEDGWICK, J., wrote for affirmance with costs, holding as above laid down.

VAN VORST, J., concurred.

HENRY C. DART, PLAINTIFF AND RESPONDENT, v.
WRIGHT GILLIES, AND OTHERS, DEFENDANTS
AND APPELLANTS.

No point of interest involved in this case.

Opinion PER CURIAM.

Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

James M. Fiske, attorney, for respondent.

Wingate & Cullen, attorneys, for respondent.

PER CURIAM.—Judgment reversed, unless plaintiff deduct \$67.75 from the verdict, and in case of such deduction, the judgment is affirmed, without costs of appeal to either party.

GEORGE W. VAN ALLEN, AND OTHERS, PLAINTIFFS AND RESPONDENTS, v. J. K. WRIGHT, DEFENDANT AND APPELLANT.

The only question involved is whether the evidence was sufficient to call for a submission of the cause to the jury, and to sustain the verdict. No point of any general interest was discussed or determined.

Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

C. B. Smith, for appellant.

Jacob F. Miller, for respondent.

PER CURIAM —Judgment appealed from, and order denying motion for new trial affirmed, with costs.

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LOUISE DOUAI WEHLE, PLAINTIFF AND APPELLANT, v. WILLIAM C. CONNER, SHERIFF, &c.,
DEFENDANT AND RESPONDENT.

Questions *appearing on the face of the record*, which the court of appeals, in its reversal of the judgment appealed from, do not pass upon, but which, if they had substance, would lead to an affirmance, must be regarded on a new trial ordered by that court (when the questions are for the first time raised), as of no substance.

Before SEDGWICK and VAN VORST, JJ.

Decided April 7, 1879.

Appeal by plaintiff from a judgment entered on a verdict for plaintiff, for six cents damages, directed by the court.

Charles Wehle, for appellant.

Vanderpoel, Green & Cuming, attorneys, and *Almon Goodwin*, of counsel, for respondent.

PER CURIAM.—Opinion for affirmance, with costs.

SARAH VALEAU, PLAINTIFF AND RESPONDENT, v.
ROBERT W. SMITH, DEFENDANT AND APPELLANT.

Before SEDGWICK and VAN VORST, JJ.

Decided May 16, 1879.

Appeal by defendant from judgment and from order

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denying motion for new trial. This case involves only questions of fact.

VAN VORST, J., wrote for reversal of the judgment, with costs, to abide the event.

SEDGWICK, J., concurred.

ROSWELL D. HATCH, PLAINTIFF AND APPELLANT, v. THE MAYOR, &c., OF THE CITY OF NEW YORK, IMPLEADED WITH J. NELSON TAPPAN, CHAMBERLAIN OF SAID CITY, AND JOHN J. BOWES, RESPONDENT.

NEW YORK CITY.

1. GRADES OF STREETS, CHANGING OF, AWARDS FOR.

1. *Award of damages under chapter 52, of the Laws of 1852, made to a certain named person by the board of assessors, and part paid by the comptroller, with the assent of such named person, to the collector of assessments and clerk of arrears, in discharge of certain assessments for certain improvements theretofore laid upon the property, in respect whereof said award was made, and balance paid under the provisions of said chapter to the city chamberlain.*

(a) CLAIMANT in opposition to the person named in the assessment list as entitled thereto, REMEDY OF.

1. *Has no action against the mayor, etc., for the part paid to the collector and clerk of arrears.*
2. *Has an action against the chamberlain for the part remaining in his hands.*

Before VAN VORST and SPEIR, JJ.

Decided May 16, 1879.

The appeal presents another phase of the case of Hatch v. Bowes, impleaded, reported 43 N. Y. Super.

Opinion of SPEIR, J.

Ct. 426, where a statement of the case will be found. The appeal the decision wherein is reported in 43 *N. Y. Sup. Ct.* was from an order overruling a demurrer interposed by defendant, Bowes. After the decision of that appeal, the defendant, Bowes, and defendants, The Mayor, &c., and J. Nelson Tappan, chamberlain, &c., answered.

The trial of the issues joined by these answers resulted in a judgment dismissing the complaint as to the mayor, &c., with costs, adjudging that, as against defendant, Bowes, the plaintiff was entitled to the whole award, with costs, and that said Tappan, chamberlain, pay to plaintiff the sum of \$336.39, the portion of the award remaining in his hands, with such interest as had actually accrued to him thereon, with costs.

The only appeal taken was that of plaintiff, from that part of the judgment which dismissed his complaint as to the mayor, &c.

James A. Deering, attorney, and of counsel, for appellant.

J. A. Beall, and *Arthur Berry*, with *William C. Whitney*, counsel to the corporation, of counsel, for the respondent.

SPEIR, J., wrote for affirmance, holding the propositions stated in the head-note.

VAN VORST, J., concurred.

ABRAHAM RICH, JR., PLAINTIFF and RESPONDENT,
 v. JAMES H. LYLES, ET AL., DEFENDANTS AND
 APPELLANTS.

Before VAN VORST and SPEIR, JJ.

Decided May 16, 1879

Appeal by defendant from judgment and from order denying motion for new trial.

In this case the plaintiff agreed to deliver to the defendant, at Havana, Cuba, a specified quantity of "good clear ice," at an agreed price, for which plaintiff recovered judgment herein.

On the trial there was evidence on behalf of plaintiff that the ice was in good condition at the time of shipment, in Maine, and there was a conflict of testimony as to its condition and quality when delivered. The defendant offered to show by the testimony of experts that ice under certain condition is subject to a peculiar change called "striking," which greatly diminishes its value, rendering it no longer good clear ice, and which is more difficult of detection and deceptive in appearance than ordinary changes.

The principal question involved herein is as to the admissibility of this testimony, which was excluded on the trial.

Wilson & Wallis, attorneys, and *Luther R. Marsh*, of counsel, for appellants.

Benedict, Taft & Benedict, attorneys, and *Addison Brown*, of counsel, for respondents.

SPEIR, J., wrote for reversal and new trial.

VAN VORST, J., concurred.

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ANNA M. DOWNES, PLAINTIFF AND APPELLANT,
v. DAVID SILBERSTEIN, DEFENDANT AND RE-
SPONDENT.

Before VAN VORST and SPEIR, JJ.

Decided May 16, 1879.

Appeal from judgment entered upon a verdict for defendant, directed by the court.

This action was brought to recover \$2,000, on the alleged ground that the defendant, in building an extension to his house, encroached upon plaintiff's premises.

The case involves only questions of fact.

H. Thompson, attorney, and *G. A. Clement*, of counsel, for appellant.

Julius Lippman, for respondent.

PER CURIAM.—Memorandum for affirmance with costs.

BENJAMIN WHITWORTH, ET AL., PLAINTIFFS,
v. THE ERIE RAILWAY CO., DEFENDANT.

A contract made by one carrier for the transportation of goods over his own and connecting lines, adopted and acted upon by the other carriers, inures to the benefit of all thus ratifying it—*e. g.*, one containing a clause exonerating the carrier and the connecting lines from liability from loss by fire, &c.

Held, in this case, that such exoneration did not extend to case of loss by fire, resulting from defendant's negligence; but proof of the destruction by fire does not, of itself, warrant any inference that such

Opinion PER CURIAM.

fire resulted from the negligence of the defendants, and the burden is upon the plaintiffs to establish the fact of such negligence by a clear preponderance of credible testimony.

The defendants in this case were bound to deliver the goods to the succeeding carrier, and within a reasonable time, and in accordance with the established usage and course of business. If, through their negligence, in omitting to make such delivery, the goods were destroyed by fire, they are responsible for the loss, notwithstanding the restrictive clauses contained in the bill of lading. But the burden of proof in establishing the fact of such negligence, and that the loss sustained is in consequence thereof, is upon the plaintiff. A submission of the question to the jury was not called for, inasmuch as the preponderance of evidence in favor of the defendant, upon the point in controversy, was such that a verdict against them could not be sustained.

Before SEDGWICK and VAN VORST, JJ.

Decided May 16, 1879.

Plaintiff's exceptions, ordered to be heard in first instance at general term, complaint being dismissed.

Scudder & Carter, attorneys, and *George A. Black*, of counsel, for plaintiff.

Shipman, Barlow, Larocque & MacFarland, attorneys, and *Joseph Larocque*, of counsel, for defendant.

PER CURIAM.—Plaintiff's exceptions overruled, and judgment, that complaint be dismissed, with costs, ordered.

Opinion by the Court, of SEDGWICK, J.

DAVID SOLINGER, PLAINTIFF AND RESPONDENT, v.
EDWARD EARLE, IMPLEADED, &C., DEFEND-
ANT AND APPELLANT.

In this case the plaintiff sought to recover the amount of a certain note given by him to a creditor of plaintiff's brother-in-law, to induce said creditor to sign a composition deed, which relief the court on appeal denied him (see *ante*, 80). Plaintiff, in this motion, asks for a re-argument of appeal.

Gilmour v. Thompson, 49 *How. Pr.* 198; and *Comstock v. Hier*, Ct. App. MSS.:—*Held*, not applicable, and distinguished from present case. *Maxim, Ex turpi causa, non oritur actio*,—applied.

Before SEDGWICK and SPEIR, JJ.

Decided June 13, 1879.

Motion for re-argument after order, of general term reversing the judgment below.

A. R. Dyett, for motion.

Mr. Scott, opposed.

BY THE COURT.—SEDGWICK, J.—The counsel for appellant bases his motion upon the suggestion, that the general term overlooked, or did not give due effect to the cases of *Gilmour v. Thompson*, 49 *How. Pr.* 198, and *Comstock v. Hier*, court of appeals, MSS. The cases cited are harmonious with the opinion of the general term in this case. In *Comstock v. Hier* the fact was, that the plaintiff had an action for his note, and no part of his action rested upon proof of an illegal transaction between him and defendant, in the course of which, he had delivered the note to him. In *Gilmour v. Thompson*, the plaintiff had a right of action, although the transaction was illegal, because he was the debtor, and so, in the estimate of law, the

Opinion of the Court, by SEDGWICK, J.

victim of oppression. In the present case, the plaintiff was a party to the illegal transaction, but not a victim. His participation in it was voluntary. He cannot, therefore, avail himself of circumstances that would otherwise show a conversion by defendant. Without proof of the illegal act, the presumption would be that the defendant held the note, by voluntary delivery and value. This presumption could be rebutted only by testimony as to the illegal transaction. But such testimony the law does not allow the plaintiff to give, for a right of action cannot spring *ex turpi causa*.

Motion denied with ten dollars costs.

SPEIR, J., concurred.

DAVID SOLINGER, PLAINTIFF AND APPELLANT,
v. HENRY R. EGELSTON AND OSCAR C.
WHEELER, IMPLEADED, DEFENDANTS AND RE-
SPONDENTS.

Before SEDGWICK and SPEIR, JJ.

Decided June 18, 1879.

Appeal from judgment in favor of defendants on two demurrers, severally interposed by them to complaint.

A. R. Dyett, for appellant.

Scott & Bird, for respondents.

BY THE COURT.—SEDGWICK, J.—The learned judge below followed the decision of *Solinger v. Earle*, impleaded, &c. (*ante*, p. 80), and his judgment must be

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sustained. There has been at this term a motion for re-argument in *Solinger v. Earle*, which we have denied (*ante*, p. 604).

Judgment affirmed, with costs.

SPEIR, J., concurred.

CHARLES C. HOVEY AND WILLIAM P. DOLE,
PLAINTIFFS AND RESPONDENTS, v. AUGUSTUS R.
McDONALD, DEFENDANT AND APPELLANT.

I. LIEN ON CLAIM.

1. TROVER AGAINST LIENOR.

(a) Where the lienor obtains possession of the proceeds resulting from the claim, and converts them to his own use, he is liable to the lience as for a conversion, to the extent of the lien.

1. *Receiver of proceeds, effect of paying over to lienor under order of court.*

(a) Where the order is reversed, and the lienor directed to repay, the fact of his having obtained possession from the receiver is *no defense to the action of trover.*

II. RES ADJUDICATA.

1. In an action commenced by a liencee against a lienor, to have his lien adjudged valid, and enforce payment thereof, the lienor appeared and answered; his answer was struck out by the court, and final judgment given in favor of the plaintiffs, directing the lienor to pay to the plaintiffs the amount claimed by them, and adjudging that plaintiffs have a lien, as claimed by them.

Held,

in an action by the liencee against the lienor, for a conversion of the subject of the lien, *that the judgment* in the action to have the lien adjudged valid, *barred* the lienor from contesting the existence of the lien or the validity of the contract under which it was claimed.

(a) SUBMITTING TO JURISDICTION. After a party submits himself to the jurisdiction of a court, it is too late for him to question its jurisdiction in another tribunal.

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III. *Supreme Court of District of Columbia is a court of general jurisdiction.*

Before SEDGWICK and SPEIR, JJ.

Decided June 13, 1879.

Appeal from an order denying a motion to vacate an order of arrest.

Defendant had a claim pending before the British and American Claims Commission, for cotton destroyed by the United States during the late civil war. Strictly speaking, under the treaty of Washington, this was a claim of the British Government against the United States, and defendant's claim was against his own government. But, in common parlance, the claims which, under that treaty, were presented to the commission for property destroyed, were known and spoken of as the claims of the individual owners of the property. Plaintiffs were employed by defendant to prosecute this claim, under a written agreement showing they were to be paid one-quarter of the amount which should be allowed in respect of the claim, and were given a lien therefor on said claim, and any draft, money, or evidence of debt which should be paid or issued thereon. The services were rendered by plaintiff, as agreed on, and an award was made in respect of the claim of \$197,100, in gold.

After the allowance of the award, Mr. McDonald, in order to defraud the plaintiffs, made an assignment of it to one William White.

The plaintiffs then, on October 2, 1874, began a suit against McDonald and White in the supreme court of the District of Columbia, to set aside such fraudulent assignment, to have their lien adjudged valid, and to enforce payment of their claim from the award. McDonald and White were personally served, ap-

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peared and submitted to the jurisdiction of the court, and an injunction was issued restraining either of them from collecting the money.

About the same time, one Thomas J. Phelps, claiming the award as assignee in bankruptcy of McDonald, also began an action in the same court against him and White, in which action another injunction was issued.

February 16, 1875, an order was entered by the consent of all the parties to both suits, vacating both injunctions, permitting White to collect half the award from the British Government, and directing George W. Riggs, of Washington, to collect the other half, and hold it, subject to the claims, liens and rights of the plaintiffs herein, Hovey and Dole, and of the assignee, Phelps, to be determined by the further decree of the court. It was further ordered that Riggs, the receiver, should invest the money in the bonds in the District of Columbia.

Riggs drew the money, and invested it in bonds of the District of Columbia.

McDonald and White demurred to the plaintiff's bill in equity; the court at special term sustained the demurrer, dismissed their bill, and, on June 28, 1875, made an order directing the receiver to pay over the funds in his hands to McDonald and White. Upon receiving this order, the receiver handed the bonds over to McDonald, assigning the certificates to him. McDonald then requested the receiver to sell the bonds for him. This was done. He received the money, and, leaving Washington hurriedly, secretly, and by unusual conveyance, took it to New York.

The plaintiffs appealed to the general term from the order sustaining the demurrer to their bill, and there it was reversed, and an order was made directing McDonald to repay the money into the registry of the court, which he refused to do.

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McDonald and White then interposed an answer, and a large amount of testimony was taken upon the merits. Meantime the plaintiffs applied to the courts to have McDonald punished for contempt, and finally, the general term, having ordered his answer to be struck out for his contempt in April, 1878, gave final judgment in favor of the plaintiffs.

This judgment, after reciting the inception of the lien, the fraudulent assignment to White, &c., directed McDonald and White to pay to the plaintiffs \$49,297.50, and further ordered, adjudged and decreed that the complaint have a lien upon the claim of McDonald, and upon any draft, money evidence of indebtedness or proceeds thereof.

Upon this state of facts, McDonald being found in New York, this action was begun. The plaintiffs claim that when the receiver invested this money in the bonds of the District of Columbia, their liens attached to them at once, and that, when McDonald sold these bonds and appropriated their proceeds to his own use (no matter how they came into his possession), he was guilty of conversion, and is now guilty of a wrongful detention of personal property, namely, \$49,297.50, belonging to the plaintiffs.

Defendant, having been arrested upon an order of arrest, moved at special term to vacate the order, the motion was denied, and defendant appealed from the order entered on such denial, to the general term of this court.

C. W. Bangs, attorney, and of counsel, for appellant, submitted an elaborate brief, and, among other things, urged strenuously that defendant, having obtained possession under the order of the supreme court of the District of Columbia, had rightfully obtained possession, and had full right to make any subsequent

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disposition or appropriation that he pleased, without incurring thereby any liability to the plaintiff.

Douglas Campbell, attorney, and of counsel, for respondent.

SPEIR, J., wrote for affirmance.

SEDGWICK, J., concurred.

DAVID H. DE LEON, PLAINTIFF AND RESPONDENT,
v. MANUEL ECHEVERRIA, DEFENDANT AND
APPELLANT.

In this case the court *held*, the plaintiff having been unwarrantably discharged, his damages are, *prima facie*, "the amount of wages for the full term" (*Howard v. Daly*, 61 N. Y. 362).

On the trial the defendant requested the court to charge, as affecting the question whether there was a hiring for a year, that the jury should look at all "the probabilities of the case, and in so doing consider the absence of any protest on the part of the plaintiff, when he was discharged." The court so instructed, adding: "You will also consider that that was not made a point of by the defendants at the time." *Held*, that the addition did not constitute error; if it was fair to look at plaintiff's failure to insist on his rights under the contract, as he claimed it was, it was equally fair to consider the defendant's attitude, by silence or otherwise.

The case contains no exceptions to the charge, and the court did not specifically consider the points raised in relation thereto, by appellant on the appeal; but *held*, that as a whole, it presents no ground upon which a new trial can be granted.

Before SEDGWICK and FREEDMAN, JJ.

Decided June 13, 1879.

Appeal from judgment in favor of the plaintiff,

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entered upon the verdict of a jury, and from order denying defendant's motion for a new trial.

Coudert Bros., for appellants.

Lockwood & Lockwood, attorneys, and *James Clark*, of counsel, for respondents.

FREEDMAN, J., wrote for affirmance, with costs, holding in substance as above.

SEDGWICK, J., concurred.

WILLIAM F. HAMMOND, ET AL., EXECUTORS, &C.,
PLAINTIFFS AND APPELLANTS, v. CHRISTIAN
SCHULTZE AND FRIDA SCHULTZE, DEFEND-
ANTS AND RESPONDENTS.*

I. *Appeal.*

1. WHEN QUESTIONS OF FACT NOT CONSIDERED ON.

Where the appeal book shows that upon the trial plaintiff's counsel excepted to the refusal of the court to permit the whole case to go to the jury, it nowhere appearing that a request to that effect was made, and it affirmatively appearing that the only question which the court was requested to submit was a specific question, not involving the whole case, according to plaintiff's view; it also appearing that no motion for a new trial, on the minutes or on a case, was made.

HELD,

The court, on appeal from the judgment, cannot consider questions of fact.

II. *Trial.*

1. EVIDENCE ADMITTED UPON, CONTRARY TO SECTION 829, CODE CIV. PRO.

Upon the trial, one of the defendants admitted that she had pos-

* A motion for re-argument of this decision, so far as it relates to the dismissal of the complaint as to defendant, Christian Schultze, was denied, Dec. 1, 1879, for the reasons herein stated.

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session of the property, for the conversion of which the action was brought, but claimed to have a lien upon it, under the statutes of New Jersey, for rent due her by plaintiff's testator. To substantiate said claim, she was allowed, against plaintiff's objection and exception, to prove, by her own testimony, a hiring, by the deceased, of a part of her house, at an agreed rental, the occupation thereof, &c., &c.

HELD,

error, as involving personal transactions between the deceased and a party interested in the event, as against executors.

Also held, that defendant's claim that plaintiff opened the way for such testimony, by examining one of the executors on the same point, is not well founded, he having been examined simply as to the language used by the defendants in the assertion of their claim for unpaid rent, as a ground for refusing to give up the property when demanded.

III. *Trover.*

1. WHEN DEFENDANT NOT LIABLE IN.

A mere demand and refusal to deliver, without proof either of possession or control over the property claimed to have been converted, *held*, not sufficient to make the defendant, Christian Schultze, liable in trover herein. This, though the refusal was based upon the claim of a lien. If there was any wrongful detention, it was by the other defendant.

Before SEDGWICK and FREEDMAN, JJ.

Decided June 13, 1879.

Appeal by plaintiffs from judgment.

This action was brought by the plaintiffs, as executors of the last will of William H. Hammond, deceased, to recover damages for the conversion of certain personal property.

The defendants interposed separate answers to the complaint.

Defendant, Christian Schultze, admits the former ownership of the property by deceased, and sundry unimportant averments, and denies all other allegations.

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The defendant, Frida Schultze, admits the same facts, and also the detention of the property in question by her, and claims, as an affirmative defense, that she had a lien thereon under the laws of the State of New Jersey, for rent due her from deceased.

H. D. Betts, for appellants.

William Bro. Smith, for respondents.

FREEDMAN, J., wrote (holding as above), for affirmance with costs, as to the defendant, Christian Schultze, and for a reversal and new trial as to the other defendants, costs to abide the event.

SEDGWICK, J., concurred.

THE NEW YORK GUARANTY AND INDEMNITY CO. v. VALENTINE GLEASON.*

Before CURTIS, SEDGWICK and FREEDMAN, JJ.

PER CURIAM.—Judgment affirmed, with costs.

FERDINAND FOLLER, PLAINTIFF AND RESPONDENT, v. HENRY J. LIPPE, DEFENDANT AND APPELLANT.

Before SEDGWICK and FREEDMAN, JJ.

Decided June 13, 1879.

* See 43 *Super. Ct.* 551. Decision in above case reversed by court of appeals. See 9 *Weekly Dig.* 373.

Opinion of FREEDMAN, J.

Appeal from judgment in favor of plaintiff, entered upon the verdict of a jury, and from an order denying defendant's motion for a new trial.

This case involves mainly questions of fact.

John B. Pannes, for appellant.

Simon Sultan, for respondent.

FREEDMAN, J., wrote for affirmance, with costs.

SEDGWICK, J., concurred.

JOHN HICKEY, PLAINTIFF AND RESPONDENT, v.
OWEN O'CONNOR, DEFENDANT AND APPELLANT.

EXAMINATION BEFORE TRIAL.

When not granted. The order in this case was held to have been properly vacated, under the decisions of this court, in *Levy v. Loeb*, *Corbett v. De Comeau*, and *Batterson v. Sandford*.

Before SPEIR and FREEDMAN, JJ.

Decided June 18, 1879.

This is an appeal from an order vacating an order granted under section 873 of the Code of Civil Procedure.

George W. Wilson, for appellant.

Walter Durack, for respondent.

FREEDMAN, J., wrote for affirmance, with costs.

SPEIR, J., concurred.

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THE GERMAN SAVINGS BANK, &c., v. AGATHA
HABEL, AND ANOTHER.

Before FREEDMAN and SPEIR, JJ.

Decided June 13, 1879.

BY THE COURT.—The order made and entered on the 18th of April, 1879, must be affirmed, with costs.

HENRY B. KINGHORN, AS RECEIVER OF THE
PROPERTY OF JAMES M. MELVILLE, PLAINTIFF
AND APPELLANT, v. EDWARD WRIGHT,
JAMES M. MELVILLE AND LOUISA, HIS
WIFE, DEFENDANTS AND RESPONDENTS.

I. *Fraudulent conveyance.*

1. Action by judgment creditors to set aside one.

(a) PRIOR CONVEYANCES BY JUDGMENT DEBTOR OF OTHER PROPERTY CANNOT BE ATTACKED WHEN THE ACTION DOES NOT COMPREHEND THE SETTING THEM ASIDE.

1. *Consequently the fact that the consideration for the conveyance sought to be set aside was paid by the grantee out of funds which can be traced as forming a part of the proceeds arising from the sale by the grantee of the judgment debtor of property which had been previously owned and conveyed by the judgment debtor to such grantee, is immaterial.*

1. Such proceeds cannot, in such an action, be shown to be the property of the judgment debtor, by evidence showing that the deed made by the judgment debtor to his grantee of the property from the sale whereof, by such grantee, the same was derived, was fraudulent as to creditors.

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Before SPEIR and FREEDMAN, JJ.

Decided June 13, 1879.

The plaintiff was appointed receiver of the property of James M. Melville in proceedings supplementary to execution issued on a judgment recovered by the First National Bank of Saugerties against said James M. Melville.

The action was brought to set aside a deed made by said James M. Melville and wife to Edward Wright, of premises 207 West Twenty-second street, as fraudulent and void as against creditors. This deed was made in payment for advances therefor made by Wright to James M. Melville, and for a small amount of costs paid at the time of the conveyance. No other conveyance was sought to be set aside.

Plaintiff claimed that the money out of which the advances were made was the money of James M. Melville himself.

The judge at special term dismissed the complaint on the merits, with costs, holding, among other things, that, under the complaint and the evidence applicable to the issues joined by the pleadings, the money could not be regarded as that of James M. Melville.

The original source of the money, and the mode in which it came to the hands of the defendant, Wright, appear in the opinion of the judge before whom the cause was tried at special term, which opinion was as follows:

“SEDGWICK, J.—It appears that the advances made by Wright to Melville, Maginley & Cooke, on Melville's credit, were from sums deposited to Wright's credit with Duncan, Sherman & Co. These funds were principally made up of a sum of \$9,750, the proceeds of a check to Mrs. Melville's order, paid as a consideration of the sale of the Orange Lake Hotel property, stand-

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ing in the name of Mrs. Melville, and the conveyance of this to Mrs. Melville was a part of the consideration paid to her for her conveyance of No. 37 West Twenty-eighth street. This last property had been conveyed to her by her husband through a third person, December 16, 1873. This action did not comprehend the setting aside of these conveyances to Mrs. Melville as fraudulent. Nor are there any facts in evidence which would justify these being declared fraudulent as against the creditor whom the plaintiff represents. It did not appear that, at the time of the conveyance, December 16, 1873, the defendant, Melville, meant to defraud his future creditors, still less the creditor particularly represented here. But the conclusive consideration is that these conveyances are subsisting and valid, until competently they are adjudged fraudulent, and that they cannot be adjudged fraudulent upon an examination of them as matters of evidence.

“The deposit of Mrs. Melville’s check in Wright’s bank account made the money Wright’s, and left her a creditor of Wright. There was no proof that she had ever given this money to her husband. The general evidence given by Mrs. Melville, as a witness for plaintiff, viz. : —that she gave to her husband her money whenever he requested it,—does not justify the conclusion that she had given this \$9,750 to Melville, so that the advances by Wright were made out of Melville’s money.

“It cannot be said that the relations between the parties and their transactions that regarded the disposition of Melville’s earnings do not present considerations in favor of plaintiff; and upon these considerations the counsel for plaintiff has made an exhaustive and very able argument, but the conclusion must be that they do not amount to proof. And it is further right to say that defendant claimed that the transaction alluded to did not call for explanation on the common issue in this case.

Opinion of SPEIR, J.

"If the money did not belong to Melville, it does not change the legal effect of the action that Mrs. Melville was a creditor of Wright.

"The complaint is dismissed with costs, but no allowance."

From the judgment of dismissal on the merits, with costs, entered upon the findings of facts and law made by the court below, plaintiff appealed.

Coleridge A. Hart, attorney, and *Horace C. Downing*, of counsel, for appellant.

Townsend Wandell, attorney, and *Jacob F. Miller*, of counsel, for respondent.

PER CURIAM.—The judgment should be affirmed, with costs, in the opinion of the learned judge below.

META VOLKMANN, ET AL., PLAINTIFFS AND RESPONDENTS, v. HENRY FIELDMANN, DEFENDANT AND APPELLANT.

Before SEDGWICK and SPEIR, JJ.

Decided November 3, 1879.

Appeal from judgment, in favor of plaintiff.

Edward S. Clinch, for respondent.

Henry Wehle, for appellant.

SPEIR, J., wrote for affirmance, with costs.

SEDGWICK, J., concurred.

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CHARLES L. WRIGHT, PLAINTIFF AND RESPONDENT, v. ADOLP LECOUR, DEFENDANT AND APPELLANT.

Before SPEIR and FREEDMAN, JJ.

Decided November 3, 1879.

Appeal from an order made by the judge before whom the case was tried, setting aside the verdict of the jury as against the evidence, and granting a new trial.

The case involves no point of interest.

F. J. Moissen, for appellant.

Edwin M. Felt, for respondent.

SPEIR, J., wrote for affirmance, with costs.

FREEDMAN, J., concurred.

IN THE MATTER OF THE PETITION OF THE BOWERY SAVINGS BANK v. CAMILLE MAHLER, AS EXECUTOR, AND GEORGETTE GOLDNER, FOR AN INTERPLEADER.

I. INTERPLEADER.

1. *Motion for, by savings bank.*

The application of the bank, under *Laws 1875, c. 371, § 25*, was a motion in the action then pending against it, and not a special proceeding.

COSTS.—The order of interpleader allowed “the costs of the petitioner herein.” *Held*, costs in the action to time of

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motion were meant. The order was not appealed from, and hence was binding on the clerk and judge who entertained the appeal from the taxation.

Before SPEIR and FREEDMAN, JJ.

Decided November 3, 1879.

Appeal from order re-adjusting petitioner's costs.

Carlisle Norwood, Jr., for petitioner, appellant.

Downing & Stanbrough, for Georgette Goldner, respondent.

FREEDMAN, J., wrote, holding as above, and that the re-adjustment ordered being correct as to the amount, notwithstanding the assignment of an erroneous reason, the order appealed from must be affirmed, with costs.

SPEIR, J., concurred.

VEDDER VAN DYCK, AS RECEIVER, PLAINTIFF
AND RESPONDENT, v. JOHN McQUADE, DE-
FENDANT AND APPELLANT.

I. Corporation.

1. SAVINGS BANKS.

(a) TRUSTEES AND DIRECTORS, LIABILITY OF.

(b) PAYMENT OF DIVIDENDS OR INTEREST NOT EARNED.

1. Trustees are liable for all such payments under a resolution declaring dividends passed with their co-operation or concurrence, or subsequently approved of by them.

1. *Mode of signifying concurrence or approval.*

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(a) Need *not* be by record of a vote "Aye" on the merits, *but may* be by a *viva voce* vote.

1. This notwithstanding the terms of section 84 of chapter 371, of the laws of 1875.

2. JOINT AND SEVERAL.—The liability is several as well as joint.

3. LIABILITY RESTS ON.

1. Common law.

2. If the measure of the liability for acts done after May 17, 1875, is to be sought for only in chapter 371 of the laws of 1875, then the liability may be rested on the provisions of that chapter.

3. *As to the Yorkville Savings Bank* the liability independently of the common law may also, as to all dividends declared prior to May 17, 1875, if it be regarded as a moneyed corporation, be rested on sections 1 and 10, of article 1, title 2, chapter 18, part 1 R. S., and if not regarded as a moneyed corporation, then by virtue of the act of 1869 chartering it, upon section 2, title 4, chapter 18, part 1 R. S.

4. RIGHT OF ACTION BY REASON OF SUCH PAYMENT, ACCRUES TO WHOM.

(a) *To a receiver* under a judgment dissolving the corporation and appointing a receiver rendered in action against the corporation by the people, &c.

5. SET OFF, A CONSIDERATION.

(a) *Sums assessed on, and paid by trustees* into the corporation before the appointment of a receiver, for the purpose of paying such dividends or interest as were improperly declared and paid, *cannot be set off or counterclaimed.*

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided November 3, 1879.

Appeal by defendant from a judgment for \$13,534.25, entered against him in favor of plaintiff on the report of the referee.

This action brought to recover \$9,096.45 and interest thereon, being the amount of fifteen dividends declared, credited and paid by the Yorkville Savings Bank of the city of New York, of which plaintiff is receiver.

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Defendant was a trustee of said bank from its organization in 1869, until its dissolution; and, until December 29, 1873, was its first vice president, and chairman of its executive committee; and all said dividends were declared and paid with the knowledge and approval, and by the vote and direction of the defendant as a trustee and officer of said bank.

The bank was insolvent during its entire existence, and its income was never sufficient to pay its running expenses; and the moneys appropriated to pay said dividends were therefore mis-applied.

The action was tried before Hon. JOSEPH S. BOSWORTH, as referee, who delivered the following opinion.

“J. S. BOSWORTH, Referee.—In *Austin v. Daniels*, 4 Denio, 299, 301, the court, said: ‘Bank officers are but agents of the corporation, and if they transcend or abuse their powers, are as much responsible to their principal as are the agents of an individual. This ought to be regarded as too plain to require argument or authority, and I shall offer neither.’

“Perry, in his treatise on the *Law of Trusts and Trustees*, enunciates as rules well settled, that the directors of corporations are trustees and agents of the shareholders and of the corporation (§ 207); that a trustee cannot sleep on his trust; that the law knows no such person as a passive trustee; that if a loss occurs from any want of attention, care or diligence, of the trustee, after he accepts the office of trustee, he may be held responsible for not taking such action as was called for (§ 266); that if a person assumes to act as trustee and becomes possessed of the trust fund, and misapplies it, he cannot protect himself by showing that he was not legally a trustee (§ 846); and that executors and administrators will be answerable for a breach of trust of their testator, though they may have distributed the assets without notice of the claim; unless the distribution was made by order of the court,

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or the time limited for suits against them has expired (§ 846).

Robinson v. Smith, 3 *Paige*, 222, 231 ; Cunningham v. Pell, 5 *Id.* 607, 612 ; Butts v. Wood, 37 *N. Y.* 317 ; Osgood v. Laytin, 3 *Abb. Ct. App. Dec.* 418, and Osgood v. Ogden, *Id.* 425, affirm these principles, illustrate to the same extent their application and the rights of action in favor of a receiver, which he can enforce.

“The act incorporating the Yorkville Savings Bank (*L.* 1869, p. 788), names the defendant as one of the incorporators (§ 1), and as one of the first trustees of that corporation (§ 4), and he continued to act as such trustee, until the appointment of the plaintiff as receiver herein.

“The dividends alleged in the complaint to have been declared and paid, were declared by the co-operation, concurrence and approval of the defendant.

“There was no surplus profits at the time these dividends were declared, out of which they or any part thereof could be paid, and this fact was well known to the defendant. His misconduct, by willfully co operating with other trustees to effect, and in effecting a declaration and payment of dividends, when there was no surplus profits out of which they could be paid, is clearly and fully established. I think, therefore, that independent of any statutory enactments, he is liable to the corporation for this misconduct, and that the receiver can enforce that liability.

“I think the defendant is, also, clearly liable by force of statutory provisions, whether this corporation is or is not a moneyed corporation, within the meaning of that term, as defined by the Revised Statutes.

“Section fourteen of the act incorporating this corporation (*L.* 1869), declares that ‘the corporation hereby created shall be subject to the provisions of the eighteenth chapter of the first part of the Revised

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Statutes, and all other general laws affecting savings institutions, so far as the same are applicable. . . .

"Section 2, of title 4, of that chapter (1 *R. S.* 601), declares that it, shall not be lawful for the directors or managers of any incorporated company in this State to make dividends, excepting from the surplus profits accruing from the business of such corporation, . . . and in case of any violation of the provisions of this section, the directors, under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the said directors at the time, or were not present when the same did happen, shall, in their individual and private capacities, jointly and severally be liable to the said corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock of the said company so divided, withdrawn, paid out or reduced, with legal interest on the said respective sums, from the time such liability accrued, and no statute of limitations shall be a bar to any suit at law or in equity, against such directors for any sums for which they are made liable by this section.'

"This language is so clear and precise, that there can be no doubt that it includes a corporation like the Yorkville Savings Bank.

"Such continued to be the law up to the time that chapter 371 of the *Laws* of 1875, (passed May 17, 1875,) took effect and still continues to be applicable to the directors or managers, of savings institutions, unless, as to them, it is repealed by the act of 1875. Section 56 of the act (*Id.* 416) repeals several enumerated statutes, relating especially to savings banks. No part of the Revised Statutes is, in terms, repealed. If repealed, it must be because some provisions of the act of 1875, relating to its trustees or managers, are in direct conflict with the part of the Revised Statutes above quoted. I do not

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discover anything in the act of 1875 which is necessarily of this character. If it is claimed that section 52 (*Id.* 416) is of this character, it may be answered, as I think, that that section only relates to the powers, privileges, duties and restrictions conferred upon the corporation itself, and confirms the powers, rights and privileges of the corporation and subjects the corporation to the duties, restrictions and liabilities imposed by that act. It does not in terms, and in my opinion it does not by necessary implication repeal so much of the act of 1869 as imposes upon the trustees the liability above stated, for making dividends, when there are no surplus profits with which to pay them. Hence, it is clear, that if this corporation is a moneyed corporation, the trustees are liable for all dividends declared prior to the passage of the act of 1875, under sections 1 and 10 of 1 *R. S.* 591, and if not a moneyed corporation, then for all such dividends under section 2 of 1 *R. S.* 601 (*Vide Id.* § 11, p. 605).

“And even if the ground and measure of the liability of a trustee of a savings bank, for acts done after the act of 1875, are to be sought only on that act, then it will be found that section 33 of that act (p. 411) makes it the duty of the trustees of such corporation to regulate the rate of interest, not exceeding six per cent. per annum, upon the deposits therewith, in such manner, that depositors shall receive, as nearly as may be, all the profits of such corporation, after deducting necessary expenses.

“Section 34 declares that no dividends or interest shall be declared, credited or paid, except by authority of a vote of the board of trustees, duly entered upon their minutes, wherein shall be recorded the ayes and noes upon such vote, and whenever any interest or dividends shall be declared and credited in excess of the interest or profits earned and appearing to the credit of such corporation, the trustees voting for such

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dividends shall be jointly and severally liable to the corporation for the amount of such excess so declared and credited.

"The words 'interest' and 'dividends' are used in this act, as equivalent expressions. I cannot accede to the proposition that only such trustees are liable as appear by the minutes to have voted 'aye,' in favor of making a prohibited dividend. Nor that those who caused it to be declared, if paid in pursuance of such declaration, are not liable, because it may have been declared at a meeting when less than a legal quorum was present. All who voted to make the declaration, though they may have voted *viva voce*, and all who subsequently, at a meeting of the board, approved of such act, though they approved of it by a *viva voce* vote, are liable; they voted for it within the meaning of the provision, imposing the liability named for the misconduct specified. I think, therefore, that the defendant is liable by the rules of the common law, and is liable under and by force of the statutory law.

"I think the right of action upon this liability of the trustee is vested in the receiver.

"By the act of 1875, the liability imposed is declared to be a liability to the corporation. There can be no question that such a right of action is vested in the receiver.

"The liability created by section 2, of title 4, of chapter 18, of the Revised Statutes (vol. 1, p. 601), is declared to be a liability to the said corporation and to the creditors thereof, in the event of its dissolution.

"The provision of law, under which, in *Osgood v. Laytin* (*supra*) it was held that an action could be maintained by the receiver, provided, that 'any dividend so made shall subject each of the stockholders receiving the same, to an individual liability to the creditors of such company, to the extent of such dividends received by him' (4 *Edm. R. S.* 210).

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"The act last cited, subjects each of the stockholders receiving a dividend, to an individual liability to the creditors of such company ; though the liability is several, it is to the creditors generally, and not to each creditor. The liability imposed by the Revised Statutes, though several as well as joint, is to the creditors thereof generally ; that is, to the creditors of the corporation, in the event of its dissolution. The reasons assigned by the court, GROVER, J., in *Osgood v. Laytin*, 3 *Abb. Ct. App. Dec.* 424, at the foot of that page, for holding that the receiver might maintain the action in that case, apply with like force to this, and that case is an authority in point, in favor of the receiver's right to maintain this action.

"Hence, it follows that whether the liability throughout is declared by the Revised Statutes, or whether his liability as to acts done since the passage of the act of 1875, is to be determined and measured by the provisions of that act, the right of the receiver to recover seems to be free from reasonable doubt. And it also follows, that the defendant is liable in this action, for the amount of the dividends declared by his concurrence and co-operation.

"I think there is nothing in the defense of non-joinder of parties set up in the answer. Even if it be open to the defendant to avail himself of the alleged defect by answer, it appears that some of the persons alleged to be co-trustees with the defendant, were not trustees when some of the dividends were declared and credited, and are not liable therefor ; and the liability of the trustees is several as well as joint.

"The alleged counter-claim is unavailable. The action sounds in tort. It is brought to enforce a liability caused by the misconduct of the defendant. As to the sums assessed upon, and paid by the trustees into the bank, the liability of the corporation therefor, if it be liable to pay the same, arises upon contract.

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"If, by the terms of the resolution, by which these moneys were assessed and paid, the corporation is under no liability to re-pay the same, unless "the profits of the bank warrant it," then the corporation is not liable therefor. The profits of the bank have never warranted the re-payment of any part of these moneys, and, as the institution is dissolved, never can warrant it."

Alexander Thain, attorney, and of counsel, for appellant.

Ely & Smith, attorneys, and *Frelingh H. Smith*, of counsel, for respondent.

PER CURIAM.—Judgment affirmed with costs.

CHARLES A. CAMERON, PLAINTIFF AND RESPONDENT, v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, DEFENDANT AND APPELLANT.

I. Appeals. Laws relative to taking of.

1. *No appeal from.*

- (a) An order overruling a demurrer to the complaint and giving leave to answer.

See *Garner v. Harmony Mills*, 45 N. Y. Super. Ct. 148.

2. *Final judgment.*

- (a) INTERLOCUTORY JUDGMENT, WHEN NOT REVIEWABLE ON APPEAL FROM FINAL JUDGMENT.

1. When the notice of appeal from the final judgment does not specify that the interlocutory judgment is appealed from.

Code, §§ 1301, 1316, 1317.

- (b) WHAT IS NOT A FINAL JUDGMENT FOR THE PURPOSES OF APPEAL.

When a demurrer to the complaint has been overruled, with leave to answer, and defendant does not answer, and there-

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upon it is, on motion, adjudged that plaintiff recover his damages, that the same be assessed by a jury, and that a writ of inquiry issue for that purpose, and thereupon the writ issued and the damages were assessed, and judgment was entered by the clerk against the defendant for the damages so assessed, and costs.

Held,

That the judgment was not such a final judgment as the law provides for appeals.

Before SEDGWICK, FREEDMAN and SPEIR, JJ.

Decided November 11, 1879.

In this action an order was made overruling a demurrer to the complaint and giving defendant leave to answer. From this order defendant appealed to the general term.

No answer having been served, an order was, on March 14, 1879, entered, on plaintiff's motion, made on notice, adjudging that plaintiff recover of defendant the damages by him sustained on account of the cause of action alleged in the complaint; and further ordering that said damages be assessed by a jury, and that a writ of inquiry be for that purpose issued, directed and delivered to the sheriff of the city and county of New York.

A writ of inquiry was accordingly issued, and the damages were duly assessed thereunder, on notice to defendant. Thereafter, the clerk of the court, on March 31, 1879, entered judgment against defendant for the amount of the damages so assessed, and the costs, as adjusted.

Defendant appealed to the general term from the judgment of March 31, 1879, but did not specify in the notice of appeal that it appealed from the order of March 14, 1879.

Alexander & Green, attorneys, and Charles B. Alexander, of counsel, for appellant.

Opinion of SPEIR, J.

Grimball & Tunstall, attorneys, and *R. B. Tunstall*, of counsel, for respondent.

SPEIR, J., wrote for affirming the judgment of March 31, 1879, with costs, and dismissing the appeal from the order of March 14, 1879, on the grounds stated in the head-note.

SEDGWICK and FREEDMAN, JJ., concurred.

ANDREW J. POST, ET AL., PLAINTIFFS AND APPELLANTS, v. GEORGE H. CAMPBELL, ET AL., DEFENDANTS AND RESPONDENTS.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided November 11, 1879.

This was an action to recover the value of certain materials furnished. The question involved was, whether the materials were included in the materials required to be furnished by the terms of a written contract, or were in addition thereto. The cause was tried before a referee, who found that they were included within the contract. From the judgment entered on his finding, plaintiffs appealed.

Wilson & Wallis, attorneys, and *William G. Wilson*, of counsel, for appellants.

Thomas M. Tyng, of counsel, for respondents.

SPEIR, J., wrote for affirmance.

SEDGWICK and FREEDMAN, JJ., concurred.

Opinion of FREEDMAN, J.

JONATHAN OGDEN, PLAINTIFF, v. JEREMIAH
DEVLIN, ET AL., DEFENDANTS.

I. *Attorney.*

1. SUBSTITUTION OF.

(a) A client has the *right, of his own volition*, to change his attorney of record.

1. This, though *no complaint* is made against the attorney, and though *the object* for which the benefit of his services was required has been accomplished.

1. CONDITIONS IMPOSED ON GRANTING SUBSTITUTION IN SUCH CASE.

(a) The attorney must be fully paid for his services, both as attorney and counsel.

2. FORM OF ORDER IN SUCH CASE.

Before CURTIS, Ch. J., and FREEDMAN, J.

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Decided November 11, 1879.

Appeal by defendants from an order denying their motion for the substitution of an attorney in place of the one originally retained by them.

The original attorney was the respondent.

The appeal is from an order denying defendants' motion for a substitution of attorney. On the motion it appeared that no complaint was made against the attorney, and that the object for which the benefit of his services was required had been accomplished.

Frank J. Dupignac, for appellant.

H. B. Bradshaw and *J. S. L. Cummins*, for respondent.

FREEDMAN, J., wrote for reversal, holding the proposition stated in the head-note; and further holding that

Opinion PER CURIAM.

defendants' motion should be granted by the entry of an order providing that it be referred to a referee to ascertain and determine what amount, if any, is due to the attorney of record for his services rendered as attorney and counsel, and that, upon the coming in and confirmation of the report of said referee, and the payment by the defendants of the amount so reported due, if any, and the expenses of said reference, Frank J. Dupignac be substituted as the attorney for the defendants in the place and stead of Charles G. Dahlgren.

CURTIS, Ch. J., concurred.

ALBERT L. COLES, PLAINTIFF AND RESPONDENT, v.
ALBERT COLES, DEFENDANT AND APPELLANT.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided November 11, 1879.

Action brought to recover the balance found due the plaintiff on the dissolution of a partnership between him and defendant. The answer, among other things, set forth the causes which prompted the defendant to dissolve the partnership. On motion, the allegations in these respects were stricken out as irrelevant.

Defendant appealed.

Sackett & Lang, attorneys, and of counsel, for appellant.

Edward S. Clinch, attorney, and of counsel, for respondent.

PER CURIAM.—The order appealed from should be affirmed with costs.

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MARY E. SACIA, PLAINTIFF AND RESPONDENT, v.
NEAL W. O'CONNOR, DEFENDANT AND APPELLANT.*

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided November 11, 1879.

Appeal by defendant from an order denying his motion for a new trial and for the making of one Lockwood a party defendant.

The action is ejectment. It appeared in the papers that defendant withdrew his answer, and that judgment had been taken by consent.

A. J. Roe, attorney, and of counsel, for appellant.

Ira D. Warren, of counsel, for defendant.

PER CURIAM.—Order affirmed with costs.

GEORGE W. KIDD, ET AL., PLAINTIFFS AND APPELLANTS, v. TROY PHILLIPS, ET AL., DEFENDANTS AND RESPONDENTS.

I. *Judgment.—Practice.*

1. ENTRY OF IRREGULARITY IN.

(a) *An entry within four days from the filing of the decision (the cause having been tried at special term, before a judge without a jury) and service on the opposite attorney of a copy thereof, with notice of its filing, is irregular.*

(1) IRREGULARITY IN THIS RESPECT, WHEN NOT CAUSE FOR SETTING ASIDE THE JUDGMENT.

1. *Not prejudiced.* When the party against whom the judgment was entered has not been prejudiced thereby, it will not be set aside for such irregularity.

* Decision in this case affirmed by court of appeals, December 16, 1879; 9 *Weekly Dig.* 397.

Appellants' Points.

II. *Fraudulent conveyances.*

1. Authorities bearing on, cited by counsel.

Before CURTIS, Ch. J., and SEDGWICK, J.

Decided November 11, 1879.

This action was brought to set aside a conveyance as fraudulent and void as against creditors. Judgment was rendered against plaintiffs.

The action was tried before the court without a jury. Judgment was entered before the expiration of four days from the filing of the decision, and the service on plaintiffs' attorney of a copy thereof, and notice of the filing. Plaintiffs moved to set aside the judgment for irregularity in this respect, which was denied, on the admission that plaintiffs had in no wise been prejudiced. Plaintiffs appealed from the judgment, and from the order denying the motion to set it aside.

Thomas J. Tilney, attorney, and of counsel, for appellant, on the appeal from the order, cited: *Marvin v. Marvin*, decided by the court of appeals, November 19, 1878, reported in *7 Weekly Digest*, 370. On the appeal from the judgment, he cited, to the point that a fraudulent conveyance cannot be saved by the fact that it was given for an honest debt: *Drury v. Cross*, 7 *Wall.* 302; *Johnson v. Whitwell*, 24 *Mass.* 74; *Graham v. Furber*, 14 *Com. B.* 419; *Devries v. Phillips*, 63 *N. C.* 53; *Pulliam v. Newberry*, 41 *Ala.* 168; *Goodhue v. Berrien*, 2 *Sandf. Ch.* 631; *Gans v. Renshaw*, 2 *Penn.* 36; *Rutland v. Snow*, 20 *Conn.* 27; *Waterbury v. Sturtevant*, 18 *Wend.* 353; *Solomon v. Moral*, 53 *How. Pr.* 342; 24 *N. Y.* 623; 7 *Wend.* 436; 58 *Barb.* 625. And to the point that fraud is commonly made out, not by direct proof, but by circumstantial evi-

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dence, he cited : *Wehrting v. Sturtevant*, 18 *Wend.* 361.

Otto Horwitz and *E. M. Cohen*, of counsel, for respondents, on the appeal from the order, cited : *Valentine v. Haydecker*, 8 *Weekly Digest*, 478. And on the appeal from the judgment he cited : *Laidlaw v. Gilimore*, 47 *How. Pr.* 67, affirmed by court of appeals, 1874 ; *Newman v. Cardell*, 43 *Barb.* 448 ; *Loeschick v. Hatfield*, 4 *Abb. Pr. N. S.* 210 ; *Read v. Livingston*, 3 *Johns. Ch.* 481 ; 5 *Cow.* 67 ; 2 *R. S.* 137, § 4 ; 10 *N. Y.* 190 ; *Id.* 227 ; *Carpenter v. Curren*, 42 *Barb.* 300 ; *Waterbury v. Sturtevant*, 18 *Wend.* 352 ; *Auburn Exchange Bank v. Fitch*, 48 *Barb.* 344.

PER CURIAM.—Judgment and order appealed from affirmed, with costs.

JAMES MULDOON, ET AL., PLAINTIFFS AND RESPONDENTS, v. WILSON H. BLACKWELL, ET AL., DEFENDANTS AND APPELLANTS.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal by the defendants from a judgment rendered upon the report of a referee.

W. T. Birdsall, for appellants.

J. A. Shoudy, for respondents.

CURTIS, Ch. J.—The action is for goods sold and work and labor done. The answer sets up failure to perform, and matters by way of recoupment. Upon the close of plaintiffs' case, it was submitted to the

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referee, who found for the plaintiffs. The evidence appears to sustain the findings of fact presented in the report of the referee. The exceptions of the defendants are not sufficient to call for a new trial.

The judgment appealed from should be affirmed with costs.

FREEDMAN, J., concurred.

ERIE PRESERVING COMPANY, PLAINTIFF AND
RESPONDENT, v. JONATHAN PEARSALL, ET
AL., DEFENDANTS AND APPELLANTS.

A contract between an agent of a manufacturing house, and one proposing to buy the goods sold by him as such agent, by which, payment for the said goods was to be made by supplying said agent with merchandise dealt in by the buyers,—i. e., groceries,—the parties dealing with such agent being aware that he was acting for others, *Held*, one which requires special authority or ratification.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal from judgment entered upon a verdict rendered pursuant to the direction of the court, and from order denying defendants' motion for a new trial on the minutes.

Ambrose Monell, for appellants.

Charles T. Carnes, and *E. Louis Lowe*, for respondent.

FREEDMAN, J., wrote for affirmance with costs.

CURTIS, Ch. J., concurred.

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JOHN J. CORBETT, PLAINTIFF AND APPELLANT, v.
LOUIS DE COMEAU, DEFENDANT AND RESPONDENT.*

1. *Order compelling plaintiff's attorney to disclose residence, occupation and business address of plaintiff, and staying proceedings.*

A court may in a proper case make such an order (*Corbett v. Gibson*, 18 Hun, 49).

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

Appeal from order compelling plaintiff's attorney to disclose residence, occupation, and present address of plaintiff, and staying plaintiff's proceedings until full compliance with the order.

The action is for libel, and was commenced by service of a summons—without a complaint.

Two similar applications have been made herein, the first of which was denied on the ground that no complaint had been served, and the second on the ground that "some specific object at least should be shown." The affidavit on behalf of defendant states that the complaint has been served, and further, "It is sought to make a new application upon facts raising a presumption that the plaintiff is a non-resident, and is not cognizant of these proceedings, and for the specific object hereinafter stated, viz:

"To examine the plaintiff, either before trial or upon the trial, if in the country, or by commission if he is abroad, and show:

"1. Whether or not the plaintiff is a willing party to this action, and the real party in interest.

* See *ante*, p. 588.

Opinion PER CURIAM.

"2. That the plaintiff is in fact what it is alleged that he has been charged to be (*i. e.*, insane).

"3. That the allegations alleged to be made by the defendant in the complaint herein are, if proved to have been made, *true*.

"And further, to secure, if possible, the attendance of the plaintiff upon the trial, in order that the jury may have an opportunity of judging of the plaintiff by his manner and appearance upon the stand, and lastly, to obtain security for costs in case it appears that the plaintiff is in fact a non-resident."

The judge below, in rendering his decision on the question herein, made the following memorandum:

SPEIR, J.—Upon an examination of the papers and the opinion of the general term of the second district, in the case of *Corbett v. Gibson*, I am not disposed to review the decision of that court.

Let an order be entered making the same disposition in this case on notice.

W. Frank Severance, for appellant.

Coudert Bros., for respondent.

PER CURIAM.—The order appealed from should be affirmed with costs.

Statement of the Case.

DAVID DOWS, ET AL., PLAINTIFF AND RESPONDENT, v. HENRY P. KIDDER, ET AL., DEFENDANTS AND APPELLANTS.*

I. Sale and delivery on condition that title shall not pass until payment.—Rights of vendor.—Liability of purchaser from vendee.—Action.—Party.—Defense.

1. PURCHASER FOR VALUE FROM VENDEE.

(a) WHO IS NOT, SO AS TO BE PROTECTED AGAINST VENDOR.

1. K. having agreed with A. (the vendee) to buy the bills of exchange on August 12, for \$36,000, drawn against several bills of lading, including those of the property in question, paid A. \$17,000, on account of the purchase, and for the balance, say \$18,000, drew his check to A.'s order, which A. took and immediately indorsed back to K., as security for what he (A.) might be found to owe him (K.) on previous transactions, and K. passed it to the credit of A. in that shape, and thereafter received from A. the bills of lading against which the bills of exchange were drawn. Matters thus stood, as between K. and A., when the vendors to A. notified K. that the corn was theirs, and demanded a return of it, or that K. should account for its value or proceeds.

Held,

that K. was not a purchaser for value as to the \$18,000.

(b) CONVERSION BY PURCHASER FROM VENDEE.

1. WHAT WILL CONSTITUTE.

1. If K., before demand on him, *had transferred the title and control of the goods*, it constituted a conversion, because he must, in that case, have himself received credit for them.

(c) ACTION, WHAT PROPER IN SUCH CASE.

1. Trover. An action in nature of trover is.

1. PARTY, WHO NOT NECESSARY.

A. is not a necessary party.

2. DEFENSE, OTHER PARTIES CLAIMING, WHEN NOT.

The facts that, *after plaintiff's demand*, other parties made

* NOTE—See *Farmer's & Mechanic's National Bank, &c. v. Hazeltine*, *ante*, 576.

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similar claims in respect to the goods covered by the other bills of lading, present no defense.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided December 1, 1879.

This is an appeal by defendants from a judgment entered against them in favor of plaintiff for \$17,652.12, upon the report of a referee.

The facts of the case, as found by the referee, are as follows:

On July 24, 1876, plaintiffs agreed to sell to Thomas Atkinson, doing business under the name of Thomas Atkinson & Co., and said Atkinson agreed to buy of plaintiffs 50,000 bushels of sound Western mixed corn, as per sample, at fifty-five cents per bushel of fifty-six pounds, to be delivered during first half of August in prime shipping condition to buyer's vessel or store, payment to be made in cash on delivery.

On August 10 and 11, 1876, on request of said Atkinson, plaintiffs caused 24,869²³/₁₀₀ bushels of corn, of which they were possessed as owners to be delivered on board the bark *Emilio Ciampa*, then being at Brooklyn in the port of New York and bound to Cork for orders; said corn was so put on board, for account and to be held for account of plaintiffs; plaintiffs, as owners of said corn, according to the usual course of business, received the return of the official weigher dated August 11, showing the delivery of the said quantity of corn on board said vessel; the price of said corn at the sale agreed on, with customary proportion of expenses, amounted to \$13,802.61, for which a bill was rendered at the time of the delivery of the weigher's return, as hereinafter mentioned, for payment to be made in cash; on August 12, aforesaid, plaintiffs made a conditional delivery of said corn to

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said Thomas Atkinson, by delivering to him the said weigher's return indorsed by plaintiffs, the condition of such delivery being, by standing agreement between said Atkinson and plaintiffs, that the title to said corn should not pass by such delivery until the payment of the price in cash, which agreement was supplemented by a special promise at the time of delivery to give a check for the amount of the bill at two o'clock of the same day; the title papers for said corn were indorsed by plaintiffs and delivered to said Atkinson for the purpose of enabling Atkinson to procure bills of lading, in his own name, for the corn, and to prepare and sell his exchange drawn against the same; a check for the price of said corn was demanded by plaintiffs of said Atkinson on the same day, and was refused, and thereupon the return of the corn or of the bills of lading therefor was also demanded of said Atkinson, and refused.

Said Atkinson, on the same day, publicly failed, and made a general assignment for benefit of his creditors.

Said Thomas Atkinson, by means of the said weigher's certificate, so indorsed to him by plaintiffs, procured from the master of said bark *Emilio Ciampa* bills of lading for said corn, three in number, in the name of Thomas Atkinson & Co., as shippers; and on the same August 12, 1876, transferred the same to defendants, as security for three bills of exchange for £2,050 sterling, drawn by said Thomas Atkinson & Co. against said corn, and forming part of a parcel of exchange amounting to £6,725 sterling that day sold to defendants by said Atkinson at the aggregate price of \$36,331.81.

Defendants paid to said Atkinson, on account of said purchase of exchange, \$17,000, and no more; by the mail which closed at half-past one of that day defendants forwarded the said bills of exchange

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and bills of lading, with suitable indorsement or other transfer, to their agents or correspondents in London, McCalmont Brothers & Co., with whom defendants transacted business of this kind on joint account.

Afterward, on the same day, plaintiffs notified defendants that plaintiffs were the owners of said corn, and demanded the same, or the bills of lading therefor, or that defendants should agree to account to plaintiffs for the value of the proceeds thereof.

At the time of such demand, defendants had in their own hands, of the price of the said exchange, more than \$19,000, being much more than the whole value of the said corn.

Defendants neglected and refused to comply with any of the said demands.

The purchase of said exchange from said Atkinson by defendants was in the usual course of business; the defendants paid in part for the said exchange, namely, to the amount of \$17,000 only. At the time of the said purchase and of their receiving the said bills of exchange and bills of lading, defendants had no notice of the insolvency of said Atkinson, and no reason to suspect such insolvency, and had no notice or reason to suspect that said Atkinson was not acting in his own behalf, and right and fairly and honestly, and in entire good faith, in respect to said exchange and the said corn, and then had no notice or reason to suspect that plaintiffs had any interest in or claim upon said corn, or any part thereof.

Pursuant to the sale of exchange above-mentioned, said Atkinson, at about eleven o'clock in the forenoon, or soon thereafter, of the said August 12, delivered to defendant sixteen bills of exchange, amounting, in the aggregate, to £6,725, all drawn against merchandise, among which were three bills, amounting to £2,050, drawn against the corn on board of the *Ciampa*.

Atkinson delivered to defendants with such ex-

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change all the bills of lading for said merchandise, including the bills of lading for the corn, and usual documents, except certain bills of lading representing bacon, and requested a check for \$17,000 on account of the transaction, which defendants gave him.

Soon thereafter the bills of lading for the bacon were delivered to defendants, and the transaction between defendants and Atkinson was complete, on Atkinson's part.

To complete the sale and purchase of the exchange, there remained to be paid by defendants to Atkinson the sum of \$19,331.81, balance of the price of the exchange.

About 2 P.M. the same day, Atkinson called at defendants' office, and then received their check for said balance, \$19,331.81, which he immediately indorsed and handed back to defendants, requesting that it be passed to his credit, as additional margin, to protect defendants from losses likely to occur on prior transactions, and defendants received the check so indorsed, and passed the amount to Atkinson's credit, as requested.

At the time when defendants so gave and received back the said check, they had no knowledge or notice of any claim, on the part of plaintiffs, to the corn in question.

Thereafter, plaintiffs demanded of defendants the corn in question, or its value, and defendants refused to comply with the demand.

Thereafter, namely, August 15, and on August 22, similar demands were made upon defendants by other creditors of Atkinson, for other merchandise purporting to have been represented by bills of lading accompanying the exchange, sold by Atkinson to defendants, as aforesaid, which demands amounted to \$11,779.64.

Plaintiffs' demand was renewed on Monday, August

Opinion PER CURIAM.

14, and that the defendants were willing, and offered to pay to plaintiffs the price of the exchange drawn against the corn, if Atkinson would consent; that Atkinson refused to consent, and thereupon defendants refused to pay to plaintiffs the price of such exchange, and retained possession of the corn without agreeing to account for the same to plaintiffs.

The market value of the corn on that day was fully equal to the aforesaid contract price.

The referee wrote an opinion holding the propositions stated in the head-note.

C. T. Rice, attorney, and of counsel, for appellant.

C. Van Santvoord, attorney, and of counsel, for respondent.

PER CURIAM.—The judgment should be affirmed, with costs, upon the opinion of the referee.

INDEX.

ACCOUNTING (ACTION FOR).

1. In a reference to hear and determine issues in an action for an accounting, the determination of the issues not involving the taking of the account, the referee's duty is to hear, determine and report on the issues, and if he decides that plaintiff is entitled to an accounting, then to pass on the principles on which the accounting should be had, so far as the same are involved in the determination of the issues, and to direct the entry of an interlocutory judgment for an accounting in conformity with his report. *Hathaway v. Russell*, 538.
 2. Entry of interlocutory judgment in conformity with such report is matter of course, unless there are allegations of irregularity, surprise, or newly-discovered evidence. *Ib.*
 3. On motion for interlocutory judgment on such report, there can be reviewed neither the merits nor any alleged error in the admission or rejection of evidence, or in the findings. (Mode in which a review of the merits or of alleged errors, is to be obtained, pointed out.) *Ib.*
 4. In proceeding under interlocutory judgment directing an accounting by defendant, plaintiff has a right to the formal bringing in by defendant of the account in the form of debit and credit and duly verified, and to his examination on interrogatories. *Ib.*
- Accounting under partnership agree-*

ment, principles upon which same should be conducted. See Schulte v. Anderson, 480.

See AGENCY, 5; PLEADING, 1.

AFFIDAVITS AND DEPOSITIONS.

Inadmissible to sustain report of sale on foreclosure, as against exceptions filed, by showing that terms of sale were different from those reported. See Koch v. Purcell, 162.

See EXAMINATION BEFORE TRIAL, 1, 3, 4, 7, 8.

AGENCY.

1. When the agent is vested with the apparent control of a non-negotiable chose in action, as owner, and the assignee is a bona fide purchaser for value without notice, assignee from agent of owner takes as against the owner. Voluntary assumption by agent of a claim for which he was not liable, but which was necessary to be paid to secure certain interests of the assignee, and which the assignee declined to pay, and the subsequent assignment of the chose in action in consideration of the assignee's payment of the claim, and its subsequent payment by the assignee, will constitute parting with value. *Hazelwell v. Courten*, 22.
2. Where the agent is intrusted by the real owner with an assignment of a chose in action executed in blank, he is invested by

- the owner with the apparent control of it as owner. *Ib.*
3. The plaintiffs, as executors, through their agents, leased certain premises to the defendant. The indenture of lease introduced in evidence, upon which the action was brought, was not under seal, and was signed by the lessee only, the defendant herein. The plaintiffs, said agents, were mentioned and described therein as landlords, with the word "Agents" after their names. It appeared that the defendant understood that he made the engagement to lease, &c., with persons who were acting for others. — *Held*, that an agent can bind his principal by a parol contract entered into in his own (the agent's) name, though the principal's name does not appear in the instrument; and that in this case the plaintiffs were properly in court to enforce the agreement made by them, through their agent, with the defendant. *Nicoll v. Burke*, 75.
 4. When an agent of a bank, without authority, either because the authority has not been conferred by the bank as a fact, or because it has no power under its charter to confer such power, pays away its money to an officer and agent of another bank for his bank, and such officer knows that there is no authority to pay the money, and that his bank has no right to take it, he is liable personally for the money, whether or not he has paid it over. *Query*. Whether he would be liable, if the payment was made to satisfy a claim made bona fide, although its character be such that in a case made between the principals it might turn out to be unbounded. *Am. Nat. Bk. v. Wheelock*, 205.
 5. In the case of agencies, such as the case under consideration, where accounts are involved, an action may be brought on the equity side of the court. *Walker v. Spencer*, 71.
 6. The rule that an agent cannot bind his principal in a matter in which the agent has secured to himself an interest, is well settled. In such a case the principal may repudiate the act of the agent whenever the facts become known to him. *Loeb v. Hellman*, 336.
 7. Loss occasioned by the negligence of the agent in the fulfillment of his duties, must fall upon the agent, and he is liable therefor to his principal. *Ib.*
 8. This case was one of a special agency, under which the duty of seeing that the bills of exchange were fully covered by actual shipments of cotton, and that the bills of lading were valid, was clearly imposed upon the defendants. Bills of exchange purchased by defendants for plaintiffs' account, otherwise than in strict accordance with their authority under this special agency, do not constitute a proper and legitimate charge, in favor of defendants against plaintiffs, unless it clearly appears that such violation of duty has been waived by the plaintiffs. There being no proof of such waiver, the defendants were justly held liable. *Ib.*
 9. In a sale of goods to a factor or agent, who purchases in his own name, and to whom the credit is given and the merchandise billed and charged, the principal is not liable to respond to the vendor for the price of the goods, where it appears that the principal has paid his factor or agent, for the goods. *McCullough v. Thompson*, 449.
 10. A contract between an agent of a manufacturing house, and one proposing to buy the goods sold by him as such agent, by which payment for the said goods was to be made by supplying said agent with merchandise dealt in by the buyers, — i. e., groceries, — the parties dealing with such agent being aware that he was

acting for others: *Held*, one which requires special authority or ratification. *Erie Pres. Co. v. Pearwall*, 636.

See BANKS AND BANKING, 3; EVIDENCE, 7; MUNICIPAL CORPORATIONS; USURY.

ALIMONY.

See DIVORCE.

ANSWER.

See PLEADING.

APPEAL.

1. An order requiring a defendant to make an answer more definite and certain, is not as a rule appealable. But in this case the order should not have given the plaintiff leave, in case the defendants did not amend, to apply for judgment. The relief should not have extended beyond striking out the allegations complained of; for if these allegations were stricken out, there was still an issue left to be tried before the plaintiff was entitled to judgment. This part of the order affects a substantial right of the defendant, and is appealable. *Hughes v. Chic., &c. Ro. Co.*, 114.
2. The direction, or order of the court, overruling the demurrers of the defendants, and that the plaintiff have judgment, &c., unless the defendants within twenty days, &c., pay the costs and serve an answer, is not appealable under section 1347 of the Code of Procedure. In this case the judgment is not pronounced. It is an order that plaintiff have judgment, &c., but the judgment must be entered before the defendant is entitled to an appeal. *Garner v. Harmony Mills*, 148.
3. Where the form in which matter is presented in the court below, and on the appeal, is such that, although the order below made in such form is correct, yet it does not present a question of vital importance to the appellant, and an absolute affirmance would bar the presentation of such question, the general term has power to make an order giving leave to the appellant to apply to the court below for leave to present the matter in such shape as to raise such question, and ordering that in case no such application is made to the court below, or if made, then in case it is denied, the order appealed from be affirmed; and further ordering that in case the application be made and granted, then, that the order appealed from abide the decision to be made *de novo* in the proceedings then to be taken. *Koch v. Purcell*, 162.
4. The decision of the judge made at trial term, upon the motion of a party for the postponement of the trial on account of the absence of a material witness, where an exception is taken, is a subject of review by the general term. The party aggrieved may, upon a case made, containing his exception, move at special term for a new trial, or he may present the exception for review by appeal from the judgment. In either case the affidavits used on the motion properly form a part of the case. *Gallaudet v. Steinmetz*, 239.
5. Where it appears to the appellate court that the court below would, if specific attention had been called to the point raised on appeal, and as to which a modification is desired, have held in accordance with the views of the appellate court, the modification need not be made to depend on the respondent's being deprived of the costs of appeal. *Thompson v. Bank of British North America*, 1.
6. The defendants, on the trial, as appeared by the appeal book proposed to read, and did offer in evidence certain parts of answers

- made by a witness (examined under commission for plaintiff), to cross-interrogatories put by defendants; the only parts offered being the answers, "so far as the same were responsive to such interrogatories." Thereupon defendant moved to strike from the answers other parts, as immaterial, irrelevant, and not responsive to the interrogatories; which motion was denied. *Held*, that upon the record the appellate court must conclude, that the referee denied a motion to strike out of the deposition certain things which had not been put in evidence or proposed as such, which was not an error for which the judgment can be reversed. *Costello v. Lawless*, 276.
7. The defendants, pending this appeal, deposited, under stipulation, bonds to an amount less than that specified by the Code as security in such cases. *Held*, that they thereby waived all right to the exercise of the discretion of the court, in limiting or reducing the amount of security. *Jesup v. Carnegie*, 310.
8. Where the court of appeals reverses the judgment of the court below, unless the plaintiff stipulates to deduct therefrom certain amounts with interest, &c., but does not direct that plaintiffs' costs on appeal to the general term be waived or deducted, this court will not modify the judgment by any change of the conditions therein. *Nicoll v. Burke*, 526.
9. Costs of appeal from order are not awarded, where the point involved is one of practice, and is a new question presented for the first time. *Hesse v. Briggs*, 417.
10. In this case the objection that no demand had been proved, was not raised at the trial, but the existence of the fact, if material, seems to have been assumed by all parties, and by the referee. The defendant, on filing the exceptions to the report, sought to raise the point after the final disposition of the issues. *Held*, that, as the objection was capable of being obviated by proof, if it had been taken at the proper time; it should have been distinctly taken at the trial. Not having been taken then and there, it is not available on appeal. *Burnett v. Snyder*, 582.
11. A plaintiff has no right to prevent an appeal, unless the appellant party, in a formal and effective way, surrenders to the plaintiff his right to appeal. *Kulmer v. Brudley*, 585.
12. If there is any good reason to question the validity of an appeal, it should be done by motion in the action in which the appeal is taken. *Id.*
13. The facts, that the interests of another defendant will be promoted by the appeal, and that such other defendant is aiding in its prosecution, will not justify an injunction, whatever may be the status of such other defendant, as to an appeal in his own behalf. *Id.*
14. The case contains no exceptions to the charge, and the court therefor did not specifically consider the points raised in relation thereto, by appellant on the appeal; but *held*, that as a whole, it presents no ground upon which a new trial can be granted. *De Leon v. Echeverria*, 610.
15. Where the appeal book shows that upon the trial plaintiff's counsel excepted to the refusal of the court to permit the whole case to go to the jury, it nowhere appearing that a request to that effect was made, and it affirmatively appearing that the only question which the court was requested to submit was a specific question, not involving the whole case, according to plaintiff's view; it also appearing that no motion for a new trial, on the minutes or on a case, was made; *Held*, the court, on appeal from

the judgment, cannot consider questions of fact. *Hammond v. Schultes*, 611.

16. No appeal lies from an order overruling a demurrer to the complaint and giving leave to answer. *Cameron v. Ely Life Ass. Soc., &c.*, 628.

17. Interlocutory judgment is not reviewable on appeal from final judgment, when the notice of appeal from the final judgment does not specify that the interlocutory judgment is appealed from. *Ib.*

18. When a demurrer to the complaint has been overruled, with leave to answer, and the defendant does not answer, and thereupon it is, on motion, adjudged that plaintiff recover his damages, that the same be assessed by a jury, and that a writ of inquiry issue for that purpose, and thereupon the writ issued and the damages were assessed, and judgment was entered by the clerk against the defendant for the damages so assessed, and costs,—*Held*, that the judgment was not such a final judgment as the law provides for appeals. *Ib.*
Costs of appeal, when chargeable on referee in foreclosure. See *Koch v. Purcell*, 162.

See COSTS AND ALLOWANCES 6, 7;
TRIAL, 9; UNDERTAKING, 1, 2.

ARREST.

In case of equitable action against all defendants combined, the allegations constituting an action at law as to some defendants, as to whom the allegations make a cause of action at law, for which under the Code an arrest may be had, said defendants can, after the same has been tried as an equitable action, and disposed of as such, and the issues as to allegations constituting the legal cause of action have been sent to a jury for disposition, be arrested. *Hennequin v. Olwe*, 109.
Party deemed in actual custody,

under § 572 Code, when. See *Schmidt v. Heitner*, 834.

ASSIGNMENT.

Effect of, when delivered to agent, executed in blank. See *Husewell v. Courten*, 22.

See MORTGAGES, 1, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Declaration of trust given on, construction of. See *Lea v. Fabbri*, 361.

ATTORNEY AND CLIENT.

1. Where a motion has been properly noticed by plaintiff's attorney, but prior to its hearing plaintiff's costs are taxed, judgment is entered and paid, and a satisfaction thereon given, by reason whereof the motion cannot be maintained, and it does not appear that plaintiff, after the payment of the judgment, directed the attorney to proceed with the motion, the non-withdrawal of the motion by the attorney upon the payment and satisfaction of the judgment, is cause for imposing on him personally, in the discretion of the court, the costs of opposing the motion. *Jordan v. Shoe and Leather Bk.*, 423.

2. The order appealed from denies defendant's motion to compel plaintiff's attorney to furnish "a sworn statement showing residence, occupation, and present address of plaintiff, &c.," that the defendant might be enabled to examine the plaintiff before trial. It appeared from the moving papers that the complaint was not served, plaintiff's proceedings being stayed. *Held*, that no substantial right was necessarily involved in the denial of the motion and the case failed to disclose any exigency which demanded the order. At most the matter rested in the discre-

tion of the judge below. *Corbett v. De Comeau*, 588.

3. A client has the right, of his own volition, to change his attorney of record; this, though no complaint is made against the attorney, and though the object for which the benefit of his services was required has been accomplished. The conditions imposed on granting substitution in such case, are that the attorney must be fully paid for his services, both as attorney and counsel. Form of order in such case. *Ogden v. Deplin*, 631.

When authority to bring action in ejectment deemed sufficient under 2 R. S. 2 ed. 804, § 20; when deemed res adjudicata. See Carpenter v. Allen, 322.

Lien of attorney upon fine imposed by warrant of attachment, protected. See Wolf v. Jacobs, 583.

Order compelling plaintiff's attorney to disclose residence, occupation and business address of plaintiff, and staying proceedings, when granted. See Corbett v. De Comeau, 637.

Notice of deed to attorney of record, when notice to client. See Kendall v. Niebuhr, 542.

BAILMENT.

Depositary, how discharged from liability to depositor; payment to depositor, what will constitute. See Thompson v. Bk. N. Am., 1.

See WAREHOUSEMEN.

BANKRUPTCY.

1. In this case, plaintiff was induced by the fraudulent statements of the defendant to enter into a copartnership with him, and to contribute a large sum as capital thereto, which sum was lost to plaintiff by defendant's said deceit and subsequent fraudulent acts. Afterwards, and prior to the commencement of this action against defendant for deceit, plaintiff petitioned for and ob-

tained a discharge in bankruptcy. *Held*, that upon the above facts action cannot be maintained by plaintiff; that whatever claim he may have had against defendant passed by the assignment to his creditors, as an asset. *Hyde v. Tuffe*, 56.

2. Among the cases mentioned in Code, § 317 (security for costs), is that of a "trustee of an express trust." An assignee in bankruptcy is a trustee of an express trust, within the meaning of this section. *More v. Durr*, 154.

3. A general meeting of creditors, for the purpose of varying the original resolution of composition, and of allowing the debtor to correct his original statement of creditors, by including other parties, has power, subject to the approval of the bankrupt court, to consent to the addition of others to the original list of creditors, and to bind those so added by a resolution extending the term named in the first resolution for the payment of the composition amounts thereby fixed. *Woodruff v. Terry*, 176.

4. As to both original and additional resolutions, the bankrupt court is vested with jurisdiction upon a certain notice to creditors to inquire and determine whether such resolutions have been passed in the manner directed by law. *Id.*

5. Jurisdiction of bankrupt court cannot be attacked collaterally by evidence showing that the creditors who passed the second resolution were not creditors, because they had received the composition given by the first resolution; nor by evidence that there was no time to be extended (the resolution being one of extension), because all the composition amounts had already been paid, nor by evidence that an omission to place in the list of creditors certain creditors (the resolution being one of correction in this respect), was not a

mistake inadvertently made; because all these matters must be regarded as having been passed on judicially by the bankrupt court, when it ordered the resolutions to be recorded. *Ib.*

6. If the proper notice is given, jurisdiction is gained, although the party fails to appear. *Ib.*
7. The imposing by the register, as a condition of being allowed to appear, that the party should prove his claim, does not destroy the jurisdiction gained by the service of notice. *Ib.*
8. A debt which became due after a resolution of composition, but before a resolution extending the time to pay the composition amounts specified in the first resolution, and correcting the first list of creditors, by adding the name of the party holding the claim, such party having due notice of the second meeting, is bound. *Ib.*

See DISCONTINUANCE; TRUSTS, &c., 1.

BANKS AND BANKING.

1. A bare certification of a check, of itself alone, at the time when the drawer is not entitled to be relieved from any risk connected with the funds in the bank, will not discharge him. A holder of a check, with no specific day for payment, may withhold its presentation for payment for six years from date, and the drawer undertakes for that period to keep the drawee in funds. A certification is a promise by a drawee to do, so far as the fund is concerned, the same thing that the drawer undertook. It follows that a mere certification of such a check will not discharge the drawer. He will only be discharged, either in the event of a loss or injury accruing from a neglect to present for payment within a reasonable time after the date of the check, or in the event of a neglect to present

for payment within six years from date; *a fortiori*, where the drawee, having previously certified a check given to A., payable to the order of B., pays it on a forged indorsement, and returns it to the drawer, the drawee at the time of such return being solvent, and there being up at that time no more delay than would have been allowed or expected by the drawer, for A. to deliver the check to B., or to return it in case a delivery was not made.

Thompson v. Bank B. N. Am., 1.
2. The question as to who should bear the loss, in case of forged checks, and the case bearing upon the same, discussed. *Frank v. Chem. National Bank*, 452.

3. In this case: *Held*, "that the bank must be presumed to know the signatures of its dealers, and that it pays forged checks purporting to be signed by them at its peril. That a depositor owes no duty to the bank that obliges him to examine his pass-book after the same had been written up by the bank, and the vouchers or checks returned with it, with a view to the detection of forgeries of his name. That the depositor was bound by the acts of his clerk, only so far as he was acting in the course of his employment." *Ib.*

4. In case of payment of dividends or interest not earned, by a savings bank, the trustees are liable for all such payments under a resolution declaring dividends passed, with their co-operation or concurrence, or subsequently approved of by them. The mode of signifying concurrence or approval need not be by record of a vote "Aye" on the merits, but may be by a *viva voce* vote. This notwithstanding the terms of section 84 of chapter 871, of the laws of 1875. The liability is several as well as joint. *Van Dyck v. McQuade*, 620.
5. Liability in such case rests on:

1. Common law. 2. If the measure of the liability for acts done after May 17, 1875, is to be sought for only in chapter 371 of the laws of 1875, then the liability may be rested on the provisions of that chapter. 3. As to the Yorkville Savings Bank the liability independently of the common law may also, as to all dividends declared prior to May 17, 1875, if it be regarded as a moneyed corporation, be rested on sections 1 and 10, of article 1, title 2, chapter 18, part 1 R. S., and if not regarded as a moneyed corporation, then by virtue of the act of 1869 chartering it, upon section 2, title 4, chapter 18, part 1 R. S. *Ib.*
6. Right of action by reason of such payment, accrues to a receiver under a judgment dissolving the corporation and appointing a receiver, rendered in action against the corporation by the people, &c. *Ib.*
7. Sums assessed on, and paid by trustees into the corporation before the appointment of a receiver, for the purpose of paying such dividends or interest as were improperly declared and paid, cannot be set off or counterclaimed. *Ib.*
- When officer of bank personally liable for unauthorized payment to his bank, by agent of another bank. See Am. Nat. Bk. v. Wheelock, 205.*
2. In this case the following propositions were laid down, and their legal conclusions held; the 1st and 2d were held to be in full accord with the general rule, applicable to individual indorsers, and the 3d and last was founded on the law merchant: 1. When a party takes negotiable paper, made, accepted or indorsed by one of several partners, in or with the partnership name, and the fact that such name was not signed or indorsed in the regular course of the business of the firm is apparent on the face of the instrument, or necessarily implied in the nature of the transaction, such party cannot, though he may have parted with value on the faith of the paper, charge the other members of the firm, except upon proof that they assented to the transaction. In every such case he is chargeable, as matter of law, with notice of want of authority in the individual part-

BILLS, NOTES AND CHECKS.

1. A bare certification of a check, of itself alone, at a time when the drawer is not entitled to be relieved from any risk connected with the funds in the bank, will not discharge him. A holder of a check, with no specific day for payment, may withhold its presentation for payment for six years from date, and the drawer undertakes for that period to keep the drawee in funds. A certification is a promise by a drawee to do, so far as the fund

ner to bind the firm without their express assent. 2. When the fact, though existing, that such name was not signed or indorsed in the regular course of the business of the firm is not apparent from the face of the instrument, and the nature of the transaction appears to be susceptible of different conclusions, the question of notice is one of fact, to be determined by the jury upon all the circumstances. In every such case, the burden is again upon the plaintiff, though he may have parted with value, to satisfy the jury, either that the circumstances of the case did not constitute notice to him, or that, if they did, the other members of the firm assented to the transaction. 3. When the fact, though existing, that such name was not signed or indorsed in the regular course of the business of the firm, is not apparent from the face of the instrument, and the nature of the transaction appears to have been of such a character as to give the plaintiff a right to suppose that it was a partnership transaction, the members contesting their liability must not only show that in fact it did not constitute such a transaction, but also that the plaintiff had in some way actual notice thereof. In every such case, the burden is shifted upon the defendant to establish notice. *St. Nicholas Bank v. Savery*, 97.

3. Question who should bear loss on forged check, — discussed. *Frank v. Ch. Nat. Bank*, 452.

Payment of capital by special partner cannot be made by uncertified check. See *Maginn v. Lawrence*, 235.

Bills of exchange drawn against bills of lading, sale of. See *Dow v. Kidder*, 639.

Promissory note, when deemed held in trust. See *Morris v. Webb*, 305.

See AGENCY, 8; EVIDENCE, 4.

BOND.

See PARTIES, 1, 2; RECEIVERS.

BROKERS.

1. A broker, who agrees merely to bring parties together for the purpose of negotiation, upon consideration of a promise of one of said parties to pay him a certain percentage upon the amount of a contract thereby expected to be made, and who takes no part in the subsequent proceedings of the parties, can recover his said commissions according to agreement, though the contract entered into, and upon which they depend, is illegal and void as against public policy, *e. g.*, a contract for advertising a lottery scheme. The law does not punish a wrongful intent where nothing is done to carry that into effect, much less bare knowledge of such an intent, without any participation in it. *Ormes v. Dauchy*, 85.

2. The plaintiff, while admitting his original liability to defendant as his broker, sought to avoid it, upon the ground that it was to be implied, from a guaranty made by one Fitler, and from the other facts in the case, that he should in no event be liable to pay to defendants any loss which should accrue upon the sale or re-purchase of said stock, or upon the sale of any stock that should be re-purchased in the place thereof. The guaranty in question was inclosed in a letter to defendants, which began: "Yours, notifying me of acceptance of my offer by customer at 35, at hand. I accept his conditions as set forth in your letter, and inclose guaranty, &c." The guaranty inclosed was in these words: "For and in consideration of one-half the profit on 800 shares, &c., I hereby guarantee the holder of said 800 shares

against all or any loss whatsoever, and further agree, in case of decline of said stock, below 35, to deposit margin, if called on to do so, to cover all or any decline as fast as it may be made in said stock. Orders to sell and re-purchase said 800 shares, or any part thereof, to be given exclusively by me, the undersigned, for a period of sixty days from the date hereof." *Hell*, by the court, that the defendant, in assenting to the operation of the above, and agreeing to act upon it, did not thereby release the plaintiff from his liability on the original agreement. No fact was accomplished by the guaranty, which was inconsistent with the first arrangement. *Lee v. Garulio*, 595.

BURDEN OF PROOF.

CARRIERS, 2; DEATH, ACTION FOR, &c.; PARTNERSHIP, 1; WAREHOUSEMAN, 3.

CARRIERS.

1. What acts or statements on the part of the common carrier, tending to apprise the consignee of the arrival of the goods in question, and readiness to deliver the same, are sufficient to induce the consignee, believing the same, to make entry at the customhouse and pay duties on the same, so that afterwards, the carrier being unable to deliver said goods or account for the same, he would be deprived of the benefit of the rule limiting damages to invoice price, and be compelled to pay the invoice price of the goods, with the duty and interest on the same added thereto. The facts and the rulings of the court thereupon, as also the rules of law and decisions applicable to carriers, and their liabilities, are fully set forth and discussed in the opinion of the court. *Viotor v. Int. Nav. Co.*, 129.

2. A contract made by one carrier for the transportation of goods over his own and connecting lines, adopted and acted upon by the other carriers, inures to the benefit of all thus ratifying it—*e. g.*, one containing a clause exonerating the carrier and the connecting lines from liability from loss by fire, &c. Duties and liabilities of carriers under such a contract defined, also burden of proof as to negligence thereunder. *Whitworth v. Erie R. Co.*, 602.

CHOSES IN ACTION.

A cause of action in tort, affecting the property rather than the person of the claimant, may be bought and sold. *Hyde v. Tuffts*, 56.

When purchaser from agent vested with apparent control, takes good title; what constitutes apparent control; what constitutes parting with value. See *Hazewell v. Coursen*, 22.

CLAIM AND DELIVERY.

Neglect to prove value of goods and damages, it appearing that plaintiff is entitled to a return of the goods, is not a ground for dismissal of complaint in claim and delivery. *Banfield v. Haeger*, 428.

See PLEADING, 9.

CODE OF CIVIL PROCEDURE.

- § 14. *Gane v. Gane*, 355.
- § 317. *More v. Durr*, 154.
- § 395. *Fiske v. Hibbard*, 331.
- § 572. *Schmidt v. Heitner*, 334.
- § 829. *Hammond v. Shulze*, 611.
- §§ 870 to 836. *Heese v. Briggs*, 417.
- § 872. *Heishon v. Knick. Ice Co.*, 34.
- § 873. *Batterson v. Sanford*, 127.
- § 873. *Hick-y v. O'Connor*, 614.
- § 905. *De Leon v. Echeverria*, 240.
- § 1023. *Sniffen v. Koechling*, 61.
- § 1241. *Gane v. Gane*, 355.
- §§ 1001, 1349, 1002, 993. *Hathaway v. Russell*, 538.

- §§ 1801, 1816, 1817. *Cameron v. Eq. L. Ass. Soc. &c.*, 628.
 § 1847. *Garner v. Harm. Mills*, 148.
 § 1867. *Ennis v. Broderick*, 92.

CODE OF PROCEDURE.

- § 68. *Ennis v. Broderick*, 92.
 § 288. *Schmidt v. Heitner*, 334.
 §§ 354, 356. *Ennis v. Broderick*, 92.
 § 449. *Donahue v. O'Conor*, 278.
 § 469. *Hathaway v. Russell*, 538.

COMPLAINT.

See PLEADING.

CONDITIONS.

See INSURANCE, 1, 3.

CONSIDERATION.

In the case at bar the assignee of a non-negotiable chose in action (the assignor being the agent of the owner, but vested with the apparent right of control as owner), had become involved as a defendant in a litigation with a third party, in which suit the assignor had improperly interfered and made statements adverse to the assignee's interests, which the assignor afterward admitted to be unfounded, and withdrew; but the action could not be withdrawn, and the assignee's interest secured without the payment to the plaintiff's solicitor of \$2,000, which the assignee declined to pay, and the assignor thereupon undertook and promised to make the payment himself. And thereupon, to raise the money with which to make such payment, he sold the chose in action to the assignee, who paid him therefor \$250 cash, and agreed to pay the said the \$2,000, which he afterwards did: *Held*, that the payment of the \$2,000 was parting with value, although the \$2,000 was not a legal debt of the agent

until he undertook to pay it. *Hazewell v. Coursen*, 22.

See CONVEYANCES TO HINDER, &c., CREDITORS; MORTGAGES, 8, 4, 10; PARTIES, 3.

CONTEMPT.

Order for alimony and security for payment thereof, when not enforceable by contempt proceedings. See *Gane v. Gane*, 355.

CONTRACTS.

1. In case of promise made to one for the benefit of another, he for whose benefit the same was made may bring an action for its breach; and where a party, for valuable consideration, promises another party to pay a certain mortgage to a third party, who is the mortgagee, the latter may recover, from the party making the promise, upon a breach thereof, without foreclosure of the mortgage, and joining the mortgagor in the action. *Hand v. Kennedy*, 385.
2. In the case at bar, *Held*, that the written agreement was complete in itself, and did not appear as a supplement or part of the verbal agreement that preceded it, or in anywise dependent upon it, and the verbal agreement was properly excluded. *Munsell v. Flood*, 460.
3. Defendants, owning and controlling a certain amount of a certain stock, and plaintiff, with others, owning a certain other amount of the same stock, entered into an agreement, whereby it was agreed that neither quantity of stock should be sold, unless it was in a sale that included the other, and whereby defendants authorized plaintiff's agent to sell to P. the stock which defendants owned and controlled, for 75 per cent. of its nominal value, and certain bonds owned by them for 90 per cent. of their nominal amount, in cash,

if P. should put his offer to pay that in writing; and whereby defendants further agreed that during the negotiation they would neither buy stock, nor do anything else to interfere with the negotiations. *Held*, 1. That upon the evidence, taking it most favorably for the plaintiff, the negotiations referred to in the agreement, were only those for a sale to P. on the terms specified in the agreement. 2. That upon P.'s declination to purchase on the terms specified in the agreement, and the communication to defendant, by plaintiff's agent, of such declination, with no intimation that he (plaintiff's agent), was about to go on with negotiations with P. to effect a sale to him, the negotiations, pending which defendants agreed to inaction were at an end; and defendants were at liberty thereafter to make such purchases as they might desire. 3. If it is claimed that a purchase by defendant of a quantity of the stock pending the negotiations is a breach, plaintiff should show, that such purchase did interfere with the negotiations and the damages resulting from the effect of that breach. The damages recoverable would be proportioned to the proved effect of the breach. 4. A letter sent by plaintiff's agent to P., and answered by P. before the making of the agreement (defendants being ignorant of the letters), in which letter plaintiff's agent stated to P.: "I desire to work in your interest, and not in the interest of those who have the present control. I desire to sell the stock I control, and though I cannot commit myself just yet, I would sell it, at the average price you pay for the balance, which, with mine, would give you a majority of it. I advise you of this, that you may feel assured that if you contemplate purchasing the road, you may

depend on the 10,000 or 12,000 shares I hold. . . . I would willingly assist you, if you think I can, in getting the majority of the entire stock"—P. in answer says: "thanking you for kind offers of assistance, we will, if necessary, make use of them" (the offer contained in the letter of plaintiff's agent not having been withdrawn)—absolved defendants (who were included among those in control), from any duty or obligation they might otherwise be under in respect of the clause for inaction. The negotiations with P. for a sale on the terms stated in the agreement, having come to an end, nothing remains of the agreement, except the provision that neither lot should be sold without the other. This part of the agreement (the others having ceased to be operative), could be terminated by either party on notice to the others, and the plaintiff's request for leave to sell separately, acceded to by defendants, annulled the agreement in this respect. This, though plaintiff, at the time of the request was not aware that defendants had purchased a large quantity of stock, which, with that before held by them, constituted a majority. *Hutemeyer v. Hutemeyer*, 464.

Illegal contract, when broker's commissions on recoverable. See *Ormes v. Dauchy*, 85.

Acceptance by broker of guaranty of third party, when does not release principal from original liability. See *Lee v. Gargulio*, 595.

Contract for sale of stock, construction of. See *Jones v. Kent*, 66.

See AGENCY, 3, 10; CARRIERS, 2; CONVERSION, 3; DEMAND; EVIDENCE, 7.

CONVERSION.

1. A bank on which a check is drawn by A. for money depos-

ited with him by B., and at B.'s request made payable to C., becomes liable to A. for conversion by taking and paying the check upon a forged indorsement, before its delivery to C. The drawer of such check, by, after its payment by the bank, assuming dominion over it for the purpose of finally extinguishing B.'s claim to the money on deposit, is also liable to B. for a conversion. Demand and refusal is not necessary in such a case. *Thomson v. Bank of B. N. Am.*, 1.

2. In *Graves v. American Exchange Bank*, 17 N. Y. 205, the court did not mean to hold by the language used that, under the facts of that case, there would not have been a conversion without a demand and refusal. *Ib.*
3. Contract for the sale of lands may be the subject of conversion. *Hazenell v. Courseen*, 22.
4. In the case of a lien on a claim, where the lienor obtains possession of the proceeds resulting from the claim, and converts them to his own use, he is liable to the licensee as for a conversion, to the extent of the lien. And if receiver of proceeds, pay over to lienor under order of court, and the order is reversed, and the lienor directed to repay, the fact of his having obtained possession from the receiver is no defense to the action of trover. *Hovey v. McDonald*, 606.
5. A mere demand and refusal to deliver, without proof either of possession or control over the property claimed to have been converted, held, not sufficient to make the defendant liable herein. This, though the refusal was based upon the claim of a lien. If there was any wrongful detention, it was by the other defendant. *Hammond v. Schultz*, 611.

Purchaser of bills of exchange drawn against bills of lading, when liable

for conversion of property. See *Dows v. Kidder*, 639.

CONVEYANCES TO HINDER, &c. CREDITORS.

Prior conveyances by judgment debtor of other property cannot be attacked when the action does not comprehend the setting them aside. Consequently the fact that the consideration for the conveyance sought to be set aside was paid by the grantee out of funds which can be traced as forming a part of the proceeds arising from the sale by the grantee of the judgment debtor of property which had been previously owned and conveyed by the judgment debtor to such grantee, is immaterial. Such proceeds cannot, in such an action, be shown to be the property of the judgment debtor, by evidence showing that the deed made by the judgment debtor to his grantee of the property from the sale whereof, by such grantee, the same was derived, was fraudulent as to creditors. *Kinghorn v. Wright*, 615.

Authorities bearing on fraudulent conveyances. See *Kidd v. Phillips*, 638.

CORPORATIONS.

1. A person claiming to be a shareholder of a corporation, and whose claim is not recognized by the corporation, must establish his claim and enforce recognition by an action directly against the corporation itself. *Peckham v. Van Wagenen*, 328.
2. Where a dividend has been made and paid by a corporation among those whom it deems to be, and recognizes as, shareholders, one who claims to be a shareholder, but whose claim is not recognized or admitted by the corporation, cannot maintain an action against one of the recognized shareholders for a portion of such dividend. Such claim-

ant has no cause of action against the shareholder. The claim must be established against the corporation. *Ib.*

Illegal dividends, when directors of savings bank liable for declaration of. See *Van Dyck v. McQuade*, 620.

See MONEY HAD AND RECEIVED, 1. COSTS AND ALLOWANCES.

1. Where it appears to the appellate court that the court below would, if specific attention had been called to the point raised on appeal, and as to which a modification of the judgment is desired, have held in accordance with the views of the appellate court, the modification need not be made to depend on the respondent's being deprived of the costs of the appeal. *Thomson v. Bank B. N. Am.*, 1.
2. The court has power to require the plaintiff to give security for costs, when he is an assignee in bankruptcy, under section 317, Code of Civil Procedure. *More v. Durr*, 154.
3. Costs of appeal from order are not awarded where the point involved is one of practice, and is a new question presented for the first time. *Heane v. Briggs*, 417.
4. The defendant herein presented to the clerk, upon taxation of his costs, &c., upon a successful appeal, an item of \$28.80 for printing cases and points, which was objected to by plaintiff as excessive and unnecessary. Defendant presented, in answer, the receipted printed bills and the usual affidavit, and the clerk overruled the objection. Plaintiff thereupon obtained an order to show cause why the taxation should not be set aside, and upon the hearing it was ordered that the amount should be reduced to \$18.00, from which order defendant appeals. *Held*, that the discretion of the judge below in fixing the amount to be allowed as a disbursement, should not be interfered with; also, that the

order was not appealable. *Corbett v. De Comeau*, 587.

5. Extra allowance may be granted on the dismissal of complaint for non-appearance of plaintiff when the cause is called for trial. The fact of a trial having taken place is not a necessary element in granting. *Mills v. Watson*, 591.
 6. Motion for allowance may be made at a special term for the hearing of motions. Order granting may be appealed from to the general term. *Ib.*
 7. The order of interpleader allowed "the costs of the petitioner herein." *Held*, costs in the action to time of motion was meant. The order was not appealed from, and hence was binding on the clerk, and judge who entertained the appeal from the taxation. *Bowery Savings Bank v. Muhlen*, 619.
- Costs of appeal, when referee chargeable with.* See *Koch v. Purcell*, 162.
- Motion costs, when chargeable on attorney.* See *Jordan v. Shoe & Leather Bank*, 423.
- Discontinuance, when permitted without costs.* See *Ludington v. Bell*, 513.
- Allowance to sheriff.* See *Townsend v. Ross*, 447.

See APPEAL, 8.

COUNTER-CLAIMS.

See BANKS and BANKING, 7; REFERENCE.

COURTS.

If the complaint sets up a cause of action, the court has jurisdiction to dispose of a controversy, whether the relief called for be legal or equitable, or both. The forum of the trial, whether before the court or a jury, will be determined when it comes on to be heard. *Walker v. Spencer*, 71.

See BANKRUPTCY, 4-7; EXAMINATION BEFORE TRIAL, 6.

COVENANTS.

Break in chain of covenants, does not necessarily render a subsequent covenant to pay the mortgage inoperative. See Real Est. T. Co. v. Balch, 528.

DAMAGES.

1. Although the price paid on a sale, which is claimed to constitute a breach of an agreement for a combination of stock, is competent evidence of the value before breach, and the judge charged the jury that in determining the market value at the time of the breach, they were at liberty to consider the price paid on the sale claimed to constitute the breach, but were not concluded by it, but should consider it in connection with the other evidence on the subject, yet it appearing that the sale was one which gave to the purchaser a majority of the stock, and the complaint stating that the person who became the purchaser, in making the purchase, desired to control a majority of the stock, and for that purpose would pay a larger price than after his purchase could be obtained, and there being evidence tending to prove that without a combination, which would constitute a majority, there was no market value for the stock, and that on a combination of a majority of the stock, a higher price could be obtained, a refusal to charge "that in estimating damages the jury cannot take into account any mere chance of making uncertain profits, nor any speculative value arising from or depending upon the possibility of the plaintiff combining her stock with that of other persons." *Held*, sufficient cause for a new trial. *Havemeyer v. Havemeyer, 464.*
2. In this case the court held; the plaintiff having been unwarrantably discharged, his damages

are, *prima facie*, "the amount of wages for the full term." *De Leon v. Echeverria, 610.*

See CARRIERS, 1; LANDLORD AND TENANT, 1.

DEATH (ACTION FOR CAUSING).

1. The plaintiff is bound to show, affirmatively, that the intestate did not contribute to the result, and that the defendant's negligence was the sole cause. *Schappert v. Ringler, 345.*
2. In this case, before any request to charge had been made, the court said to the jury: "If you find, from the testimony, that this unfortunate man contributed, in any way, by his own act, to the accident which resulted in his death, the plaintiff cannot recover. But of that you must be satisfied. You must set your hand upon something that is sworn to in evidence here." And again: "If you put your hands upon anything, and satisfy yourselves that he has done something, by his own acts, by which he has lost his life, then the plaintiff cannot recover." The defendants' counsel excepted to these propositions charged, and requested the court to charge, "that if the jury believe, from the evidence, that any act of Louis Schappert aided or contributed towards his injury, then the defendants are not liable. Plaintiff must prove, to the satisfaction of the jury, that Schappert was entirely free from fault." This request was denied, and exception taken. *Held*, by the court, that these exceptions were well taken, and there should be a new trial. *Id.*

DECEIT (ACTION FOR).

See FRAUD.

DEFENSES.

Affirmative defense cannot be stricken

out upon affidavits. See *Webb v. Foster*, 311.

See BANKRUPTCY, 1; BROKERS, 2; CONVERSION, 4; RECEIVERS; SALE, 2; TRADEMARKS, 2.

DEFINITIONS.

Words "premises," "occupied" and "unoccupied," as used in policy of insurance, defined. *Herrman v. Adr. F. Ins. Co.*, 394.

DEMAND.

The omission of the complaint to state when and where the request was made may be deemed only indefinite and uncertain, but the omission to state by whom made, is probably substantial. *Marie v. Garrison*, 157.

See CONVERSION, 1, 2.

DEMURRER.

No appeal from order overruling, &c. See *Garner v. Harm. Mills*, 148; *Cameron v. Eq. Life Ass. Soc.*, 628.

Judgment entered after overruling of demurrer, and entry of order for damages and writ of inquiry, when not final judgment for purpose of appeal. See *Cameron v. Eq. Life Ass. Soc.*, 628.

Will not lie to prayer of complaint.

That plaintiff has an adequate remedy at law, no ground for. See *Walker v. Spencer*, 71.

DISCONTINUANCE OF ACTION.

1. Where a defendant pending the action has obtained a discharge of his debts for insolvency, or in bankruptcy, this court, in the exercise of its discretionary power, will permit the plaintiff to discontinue without costs; but where the plaintiff, knowing of the defendant's discharge, nevertheless goes on with the action, he will be required to

pay costs on a discontinuance. *Ludington v. Bell*, 513.

2. The plaintiff in such cases must come to the court, upon all the facts disclosed, and it must appear equitable and just that he should be relieved. If it conclusively appears that he never had a cause of action, the case does not fail within the general rule, unless the plaintiff also shows that he was misled, by appearances created by defendant, into bringing the action. *Id.*

3. In the case at bar, the application for leave to discontinue the action without costs does not commend itself to the favorable consideration and discretion of the court. *Id.*

Discontinuance by consent; semble, not sufficient to support malicious prosecution. See *Kingsbury v. Garden*, 224.

DISMISSAL OF COMPLAINT.

See CLAIM AND DELIVERY; COSTS, &c., 5.

DIVIDENDS.

See CORPORATIONS.

DIVORCE.

1. The order appealed from directed, in substance, that the defendant pay to plaintiff the alimony due to her under the judgment of divorce, to the date of the order, to wit: the sum of \$775; and also that he pay, after the date of the order, \$600 annually, in weekly payments, and that he give security for the future payment of the \$600, and in default thereof, that an attachment issue, punishing said defendant for a contempt of the court. The original judgment might have been enforced by execution, and for that reason the court had no power to enforce it, in case of disobedience, by commitment for contempt. *Gans v. Gans*, 355.

2. The statute, in permitting the

requirement of reasonable security as a means of enforcing the order or judgment in such case as above does not permit a commitment for contempt; and in case of disobedience, the only relief is the application, through sequestration, of the defendant's property to the payment of the allowance. *Ib.*

DURESS.

There cannot be any legal inference from the fact of family connection alone, that the interest of a person in a brother-in-law is so great as to cloud the judgment or affect the will, in determining how far he will aid him.—*Held*, in this case, that the refusal of defendants to sign a composition deed releasing plaintiff's brother-in-law, except upon condition that plaintiff should give his note for a certain sum over and above that mentioned in the said deed, the note to be held till other creditors should sign the composition deed, did not amount to duress or compulsion, though defendants were aware of the affinity of plaintiff to said debtor. *Solinger v. Earle*, 80.

EASEMENTS.

1. Where the owner of two or more tenements sells one of them, or the owner of an entire estate sells a portion, the vendee takes the tenement or portion sold with all the benefits which appear, at the time of its sale, to belong to it, as between it and the property which the vendor retains; but no burden or servitude can be imposed by the vendor, upon the tenements, or portion sold, in favor of the property retained by him in derogation of his grant, without a reservation expressed in the grant, unless both an apparent sign of servitude exists, on the parts of the tenements or portions sold

in favor of the property retained, and the easement claimed is strictly necessary to the enjoyment of the property retained. *Outerbridge v. Phelps*, 555.

2. Right of way of necessity arises only where there is no access to the dominant estate, except over the servient one. The fact that a way existing over the dominant land is too steep or too narrow, or less convenient, does not alter the case. It ceases, when the owner of the dominant estate acquires by the purchase of other lands, or otherwise, a way of access from a highway over his own land to the land to which the way belongs. *Ib.*
3. Right to affix signs, if merely incidental as guides to an existing right of way, would fall with the right of way. As it involves, in the case at bar, a periodical putting up and taking down of signs of various forms, sizes and appearances, it cannot be sustained, even in the case of a general reservation, without proof that the burden upon the servient estate is not increased thereby beyond the extent reserved; and in the absence of a reservation, it can be sustained only upon the additional proof of strict necessity and visibility. *Ib.*
4. Although, in the city of New York, it might be advantageous or even necessary for the transaction of their business, by occupants of premises fronting on a side street, that their premises should appear to be Broadway property, yet such requirement, on the part of their business, does not, in any legal or proper sense, constitute a necessity for the proper enjoyment of the premises. *Ib.*

EJECTMENT.

1. Where an ejectment case was tried before the court and jury, and a verdict rendered for plaintiff, and the court ordered that

the entry of judgment be stayed, and that the defendant's exception be heard in the first instance at general term; and afterwards, at general term, the exceptions were overruled, and judgment for plaintiff ordered. — *Held*, that this judgment was entered upon the verdict of a jury, and is such a judgment as is described in 2 R. S. p. 309, tit. 1. part 2, c. 5, § 36. *Phyfe v. Masters*, 338.

2. Execution was issued on this judgment, for plaintiff's costs, and the sheriff sold, thereby, all the right, title and interest of the defendant, in and to the premises described in the complaint, and the plaintiff became the purchaser and received the sheriff's deed, and the plaintiff claims that the defendant lost all right, title and interest in the premises by such sale and deed, and that the statute did not intend to give a new trial to a party who had no interest in the land, that was the subject of the action. Also, that the judgment was satisfied by the sale under the execution, and there was no judgment to be vacated under the statute. *Held*, that such claims cannot be sustained. At the time the execution was issued, the judgment was conclusive that the plaintiff had the title to the land, and that the defendant had none. There was nothing in the way of rights or interests to sell, or that could be sold under the execution. The right to make the motion for a new trial under the statute, was not, in its nature, subject to levy and sale under execution, and was not in fact sold. The sheriff's deed conveyed to plaintiff no more than he possessed before, under the judgment. *Id.*
3. But the court also *held*, in the above case, that it did not appear, by the motion papers for the new trial, that justice would

be promoted, and the rights of the parties more satisfactorily ascertained and established by a new trial. 1. No specification nor any indication apparent, in the moving papers, pointing out any error or injustice, other than a statement that the motion was made upon the affidavit annexed, and upon all papers, proceedings, and pleadings in the action. Such a notice is vague, and its general words concealed, rather than disclosed, what position was taken for the new trial. 2. The principles stated in *Wright v. Milbank* (9 *Bosw.* 672), are applicable. It is not every error, even though it may be clear, that calls for second new trial. The defendant's case has been well considered before this motion was made. Any errors on the first two trials could have been corrected on appeal. In the motion for a new trial the second time, the discretion of the court is addressed and invoked to a certain degree. *Id.*

4. The court must, in such a case, ascertain and determine that substantial justice requires the new trial demanded. It must further determine to what extent, if at all, the defendant is responsible for the court, on the former trial, having made the mistake, or omitted to consider the ground urged on this motion. If it appears that the defendant omitted to point out to the court, on the former trial, the matter now claimed as grounds for this motion, and that omission is not excused, or accounted for, but may have been intentional, then all the general principles of jurisprudence forbid that this should be considered a sufficient reason for a new trial, or that it will more satisfactorily establish the rights of the parties. Such an admission should be deemed a waiver of the objection for all future purposes in the litigation.

The present objections are of a formal or technical character, and such as would have been meritorious, if taken at the right time, but are insufficient as grounds for a second new trial. *Id.*

When authority of attorney to bring action in, sufficient under 2 R. S. 2 ed. § 14, § 20.

When authority of attorney to bring action in, deemed res adjudicata. See Carpenter v. Allen, 322.

EQUITY.

1. Courts of equity are accustomed to relieve judgment creditors against impediments fraudulently or inequitably interposed against their legal remedies. *Clafin v. Maquire, 521.*
2. Wherever superior equities exist, and are established in favor of one judgment creditor or a class of creditors against other judgment creditors, or against the property of their common debtors, courts of equity have full jurisdiction in the premises, to adjudicate upon and enforce the same, by judgment in reference thereto. *Id.*

See AGENCY, 5; ARREST; ESTOPPEL, 1; MONEY HAD AND RECEIVED, 2, 3; MORTGAGES, 1, 3, 4, 9, 10; REFORMATION OF INSTRUMENTS; SURETIES.

ESTOPPEL.

1. What acts or statements on the part of the common carrier, tending to apprise the consignee of the arrival of the goods in question, and readiness to deliver the same, are sufficient to induce the consignee, believing the same, to make entry at the Custom House and pay duties on the same, so that afterwards the carrier being unable to deliver said goods or account for the same, he would be compelled to pay the invoice price of the goods, with the duty and interest

on the same added thereto. The facts and the rulings of the court thereupon, as also the rules of law and decisions applicable to carriers, their liabilities, and to equitable estoppels, are fully set forth and discussed in the opinion of the court. *Victor v. Int. Nav. Co., 120.*

2. By the judgment of the supreme court, in an action in which one Sarah Louisa Hudson was plaintiff, and Isabella Berrand and others were defendants, it was adjudged and decreed that one Mary J. Watson was at the time of her decease lawfully seized and possessed in fee of certain lands and premises described in the said judgment, and that said Isabella Berrand and one Robert Lotta were her heirs at law, and that said lands in question descended to them as such heirs, and it was further adjudged that said lands be sold, in pursuance of the statute, to pay the debts of said Mary J. Watson. Under an execution issued upon said judgment, the said lands were sold, and the title of the plaintiffs in this action was derived from said sale. *Hell*, that this judgment, not having been appealed from, fixed and determined the rights and interests of Isabella Berrand in and to the lands described in the same. It was binding and conclusive upon Isabella Berrand, and all who claim through her. If Mrs. Berrand had any other claim to the land in question than that of heir at law, she should have set it up in that action. Her claim to the land, interposed in that action, is inconsistent with an independent and hostile claim or title to the land to herself personally, which is pleaded in this action; and it must be held that the judgment determined her true rights and interest to the land in question. *Cooper v. Platt, 242.*

3. Where, after the purchase of a

mortgage, the mortgaged premises are conveyed subject to the mortgage which the grantee, by the deed, assumes and covenants to pay, such grantee is not estopped from insisting, as against such purchaser, that he is not liable under the covenant. *Real Est. Trust Co. v. Bulch*, 538.

4. Three elements of estoppel in pais must concur. 1. A declaration made, or act done by the party against whom the estoppel is claimed, with intent that it should be acted on. 2. That the party claiming the estoppel relied and acted upon such declaration or act. 3. That the party claiming the estoppel would be injured if the other party were permitted to retract his declaration under his act. None of these elements exist in the above put case of the purchase of a mortgage. *Id.*
5. After a party submits himself to the jurisdiction of a court, it is too late for him to question its jurisdiction in another tribunal. *Hovey v. McDonald*, 606.

See PAYMENT, 2; REFORMATION OF INSTRUMENTS.

EVIDENCE.

1. As the plaintiffs are shown to be the persons entitled to execute the indenture of lease introduced in evidence and to the rent, it is to be presumed that the counterpart of the above indenture was properly executed on their behalf, it not having been introduced in evidence by the defendant, in whose possession it is presumed to be. *Nicoll v. Burke*, 75.
2. The jury are entitled to draw inferences from the probability of a defense as testified to by the defendant's witnesses. *Wygant v. Natl. B. & T. Ins. Co.*, 107.
3. When a plaintiff, to fasten a liability on a defendant by reason of an act done between a person acting on behalf of the plaintiff,

and the defendant, calls as a witness him who acted on plaintiff's behalf, who testified that the act done (to wit, the payment of a sum of money) was done under such circumstances as not to fasten a liability on the defendant (to wit, as compensation, pursuant to an agreement between plaintiff and defendant, of which the witness had no personal knowledge, for services rendered by the latter to the former), and who, upon a further examination by plaintiff, in the nature of a cross-examination, allowed on the assumption that he was an adverse witness, gives evidence tending to show that his first statement as to the circumstances under which the act was done was incredible (viz.: an inability to state what the services were for which the payment was made, or to show how and why it was that all the services which the witness had detailed were not fully compensated under an agreement between the parties, without the parties, without the payment in question), it cannot be inferred, that the transaction must have been of a kind that made the defendant responsible. If the examination, in the nature of a cross-examination, successfully showed the first statement to be incredible, the whole account of the witness must go for nothing, as not shown by a credible witness. *Am. Nat. Bank v. Woollock*, 205.

4. In the case at bar, only three of the checks claimed to be forged were produced in court, and defendant claimed that only those could be considered. *Held*, by the court, that if the proof that all checks were forged, was sufficient, that the referee was in duty bound to find such a conclusion of fact. Their production on the trial was not absolutely necessary. *Frank v. Ch. Natl. Bank*, 452.

5. There was evidence on the trial, as to the existence and nature of alterations, erasures, and tracings in the check and pass-book, and on the forged checks. An oculist testified that a certain magnifying glass was a correct one, and that it magnified four times. The plaintiffs offered the glass in evidence, and handed it to the referee, and requested him to inspect and examine with it the three checks that were produced in evidence, and that were claimed to have been forged, for the purpose of determining whether or not the signatures upon these checks were genuine. To all this, counsel for defendant objected, but the referee overruled his objection, and used the glass, and the defendant's counsel excepted to the decision of the referee, and also to his action in using the said glass. *Held*, that the referee occupied the position of a jury, in determining the question as to the alterations, erasures, and tracings, and he had the same right as a jury to use a magnifying glass in the investigation of material objects. *Id.*
6. Conversations and verbal arrangements that have resulted in a written agreement between the parties, should not be admitted in evidence to vary or change the written agreement, which must be construed as, and assumed to be the final conclusion of the verbal negotiations or conferences between the parties. *Munsell v. Flood*, 460.
7. In this case there was a contest over the allowance of a commission to the plaintiff on the purchase and sale of 100,000 pounds of copper, a portion of the gross amount of the sales, which portion defendant claimed was purchased by plaintiff on his own account, and for the purpose of enabling him to procure a sale for 550,000 pounds, a larger amount by 100,000 pounds than defendant had furnished the plaintiff to sell. The exceptions to the evidence in the case relate to this 100,000 pounds of copper. A letter of plaintiff had been read in evidence on the part of defendant, in which plaintiff wrote: "N. S. S. has secured for me 100 M. lbs. of Lake Ingot Copper for July and August delivery. . . . I herewith transfer above interest to you." The plaintiff's counsel asked the plaintiff, while testifying, "What did you mean, when you wrote the letter, by the words 'for me'?" This question was objected to, and objection overruled, and exception taken; and plaintiff's answer was, that he "must have meant—as I had asked Simpkins to sell this copper as a personal favor to me, he put it down in my name; or it must have been in accordance with my way of saying 'I have bought or sold' when I meant my principal." Another question in like manner allowed, was: "Did you desire, when you wrote that letter, to inform defendant of anything more than the fact that you had secured of Simpkins 100,000 pounds of copper for his account?" These exceptions were overruled, the court holding. 1st. The rule to be applied is not the one that relates to the words of a contract; the words "for me" were not a part of the contract, but were in the nature of an admission from the plaintiff, tending to show that he bought this copper on his own account, and he had a right to prove what he meant to state or show in the use of the words "for me," in the letter. 2d. Defendant had examined plaintiff on this subject, in such a way as to entitle him to the questions objected to, in explanation of the facts, and his admissions in the case. *Harnickell v. Brown*, 350.
8. The above questions and an-

swers made a fuller statement or explanation in regard to the matters, part of which defendant had already obtained on the direct examination. For the latter reason, the exceptions of defendant to the introduction, by plaintiff, of two entries in his own book of sales, cannot be sustained. The defendant had introduced the first of the entries at an earlier time in the trial. *Ib.*

9. There was a conflict, as to whether the plaintiff had agreed to act for one-half of the usual commission, and defendant had testified that plaintiff's agreement in this regard had followed his (defendant's) statement that one Houston had offered to sell this copper for half brokerage, and if plaintiff wanted to do it at that rate, he might do so. As to this, plaintiff testified that he then said, "You don't expect me to do the five hundred and fifty thousand business at one quarter per cent?" to which defendant answered, "Certainly not: you shall have one-half per cent." The plaintiff asked Houston, when called as a witness, if he had ever offered to sell copper for the defendant at less than usual commissions, within the year 1872, before April 1. Defendant's exception to the allowance of this question was properly overruled, for the reason that the testimony of Houston on this point would support the testimony of either the plaintiff or defendant, in regard to this contract. *Ib.*

10. Upon the trial, one of the defendants admitted that she had possession of the property, for the conversion of which the action was brought, but claimed to have a lien upon it, under the statutes of New Jersey, for rent due her by plaintiff's testator. To substantiate said claim, she was allowed, against plaintiff's objection and exception, to

prove, by her own testimony, a hiring, by the deceased, of a part of her house, at an agreed rental, the occupation thereof, &c., &c. *Held*, error, as involving personal transactions between the deceased and a party interested in the event, as against executors. Also, *he'd*, that defendant's claim that plaintiff opened the way for such testimony, by examining one of the executors on the same point, is not well founded, he having been examined simply as to the language used by the defendants in the assertion of their claim for unpaid rent, as a ground for refusing to give up the property when demanded. *Hammill v. Schulze*, 611.

Probable cause, what not sufficient to show, in action for malicious pros. See *Kingsbury v. Garden*, 224.

See DAMAGES, 1; SALE, 1; TRIAL, 6, 11.

EXAMINATION BEFORE TRIAL.

1. Where the affidavits for examination of defendants before complaint served indicate that the examination may be necessary to enable the plaintiff to give formal expression to the allegations which must in the end constitute his complaint, they are sufficient. *Heishon v. Knickerbocker L. Ins. Co.*, 34.
2. An objection to giving testimony, on the part of a defendant before trial, on the ground that it would tend to criminate the witness, should be heard and passed upon at the examination itself. *Batterson v. Sanford*, 127.
3. It should clearly appear, from the affidavits and papers upon which the order is founded, that it was the purpose of the moving party to use the testimony upon the trial. *Ib.*
4. Affidavits that state that the

- plaintiff cannot safely proceed to trial without the defendant's deposition, that the testimony is material and necessary to enable plaintiff to prepare for the trial of, and to safely try the action; yet nowhere state that it is the intention of the plaintiff to use the deposition or the testimony on the trial are defective. They imply an intention not to use the testimony on the trial. *Ib.*
5. Examination before trial, of party resident of the State, must be had in the county where the party either resides or has an office for the regular transaction of business in person. *Hesse v. Briggs*, 417.
6. Notwithstanding pendency of action in New York superior court, a party resident of the State, but who neither resides nor has an office, &c., in the county of New York, cannot be compelled to submit to an examination in that county. This although he is party plaintiff. *Ib.*
7. The order in this case was held to have been properly vacated, under the decisions of the court. in *Lery v. Lieb, Corbett v. De Comeau*, and *Batterson v. Sandford*. *Hickey v. O'Connor*, 614.
8. Fullness of statement of cause of action, effect of, does not establish no necessity for an examination, when. See *Heishon v. Knickerbocker L. Ins. Co.*, 34.
Order compelling attorney to disclose address, occupation, &c., of client, to facilitate examination before trial, when granted. See *Corbett v. De Comeau*, 588, 637.
- EXECUTION.**
- Section 572 of the Code of Civil Procedure provides that an execution against the person must be issued within three months after entry of judgment, where the defendant is in actual custody by virtue of an order of arrest in the action. A defendant released from the order of arrest in the action, and on bail, is not in actual custody, within the true intent and meaning of the term, as used in the section referred to. It seems that, in case of bail to the limits of the jail, a different rule prevails, for in such case the person is really imprisoned upon an execution, within the limits of the jail. *Schmidt v. Hainner*, 334.
- Sale, to plaintiff under execution issued upon judgment for costs in his favor, in action of ejectment, effect of.* See *Phyfe v. Musterson*, 338.
- Direction in execution, issued on transcript of justice's judgment filed in county clerk's office in N. Y. city, that same be returned to said county clerk, not clearly erroneous.* *Ennis v. Broderick*, 92.
- EXECUTORS AND ADMINISTRATORS.**
- See EVIDENCE, 10.
- FACTORS.**
- See AGENCY, 9.
- FORECLOSURE.**
- Where the report of sale shows that the deficiency was caused by the allowance of a prior mortgage which was not authorized by the judgment (the report not showing that by the terms of sale such allowance was to be made), and that but for such allowance there would be a surplus, the surplus thus ascertained will be ordered to be paid into court. *Koch v. Purcell*, 162.
 - Query.* Whether a referee, without being thereunto authorized by the judgment, can, by making it a part of the terms of sale that a prior mortgage will be deducted from the purchase money, entitle himself to be credited with the amount of the deduction. *Ib.*
 - Assignee of mortgage made after

lis pendens filed for the foreclosure of a prior mortgage, can come into court to move that referee pay into court a surplus, shown by the judgment and report of sale to exist, although he reports a deficiency. *Ib.*

4. To sustain a report of sale as against exceptions filed to it, affidavits showing that the terms of sale were different from those reported are inadmissible. *Ib.*

When costs of appeal will be ordered to be paid by referee. See *Koch v. Purcell*, 162.

See MORTGAGES, 9.

FORGERY.

See BANKS, &C., 2, 3; EVIDENCE, 4, 5; PAYMENT, 2.

FRAUD.

By the deed of composition, thirty cents on the dollar were to be paid the defendants, among other creditors, in plaintiff's notes, with the debtor's indorsement. — *Hell*, that the transaction, by which defendants, without the knowledge of the other creditors, received a further note of plaintiff (the brother-in-law of the debtor), was illegal, and a fraud upon the said creditors; and that all the parties thereto were equally in the wrong. Upon the above grounds, the court refused to interfere to aid plaintiff to recover the amount of said note paid by him. *Solinger v. Earle*, 80.

Action for fraud and deceit, reference of, when made.

Tender of issue of fraud, when will not defeat reference. See *Verplanck v. Kendall*, 525.

See BANKRUPTCY, 1; CONVEYANCES TO HINDER, &C., CREDITORS; TRADE-MARKS, &C.

GUARANTY.

Acceptance of guaranty of third

party by broker, when does not release principal on original liability. See *Lee v. Gargulio*, 595.

INDEMNITY.

See WAREHOUSEMEN, 5.

INJUNCTION.

1. The court held, as to the continuance of the injunction: Such an actual use, and danger or threat of further use, appeared, and the plaintiff, if otherwise entitled, would not be deprived of his remedy by injunction, though shortly before the service of summons, &c., the defendant had stopped using the labels in question. *India Rubber Comb Co. v. Rubber Comb Co.*, 258.

2. So far as the right to an injunction is concerned, there is no need of proof that any one has been or is likely to be deceived by the simulated label. If a court cannot judge, from the resemblance, the effect likely to be produced, it certainly may infer, from a fraudulent intent in circumstances which would permit its consummation, that it is likely that the intent will be successful. *Ib.*

Injunction against prosecuting appeal, denied. See *Kilmer v. Bradley*, 585.

INSURANCE.

1. A condition in the policy to the effect that if the party whose life is insured, shall, without the written consent of the company, travel upon the seas, or pass beyond the civilized settlements of the United States (excepting the British provinces, &c.), the policy should be void, is an important condition, and if violated, the contract is terminated between the parties by its own limitation, unless continued in force by some other provision, or by the

waiver of the violation by the insurance company. *Douglas v. Knickerbocker Ins. Co.*, 313.

2. The principles controlling the construction of "endowment policies," and the rights of the beneficiaries thereunder, fully considered. *Ib.*
3. In the case at bar, the policy covered several buildings and their contents, and contained this clause: "If the above-mentioned premises shall become vacant or unoccupied, and so remain for more than thirty days, without notice to and consent of this company in writing . . . this policy shall be void." It appeared that the dwelling-house that was destroyed by fire had been unoccupied, so as to fall within this clause, while another building, used as a dwelling-house, and forming a part of the premises insured, had been occupied continuously. *Held*, by the court, that the word "premises," in this condition or clause of the policy, covers the whole property insured—dwellings, out-houses and appurtenances together forming one establishment—and unless the whole premises became unoccupied, the condition of the policy remained unbroken. *Herrman v. Adr. H. Ins. Co.*, 394.
4. The meaning and effect of the words "occupied" or "unoccupied," considered and discussed, and the cases and decisions bearing upon the same fully reviewed and discussed in the opinion of the court. *Ib.*

INTENT.

See BROKERS, 1; PARTNERSHIP, 7; REFORMATION OF INSTRUMENTS.

INTERLOCUTORY JUDGMENT.

See JUDGMENT.

INTERPLEADER.

The application of the bank for an order of interpleader, under Laws 1875, c. 371, § 25, was a motion in the action then pending against it, and not a special proceeding. *Bow. Sav. B'k. v. Mahler*, 619.

Remedy of warehouseman in case of conflicting claims is by. Banfield v. Hueger, 428.

See COSTS, 7.

JUDGE'S CHARGE.

See APPEAL, 14; TRIAL, 5, 11.

JUDGMENTS.

1. An order or direction of the court cannot be deemed a judgment of any kind, unless on its face it determines some part of the issue. *Garner v. Harm. Mills*, 148.
2. Except in some cases like the present one, an interlocutory judgment, on an issue as to the merits, is a final determination of part of the issue, leaving the rest of the issue to be thereafter adjudged. *Ib.*
3. An entry within four days from the filing of the decision (the cause having been tried at special term, before a judge without a jury) and service on the opposite attorney of a copy thereof, with notice of its filing, is irregular. Irregularity in this respect is not cause for setting aside the judgment, when the party against whom the judgment was entered has not been prejudiced thereby, it will not be set aside for such irregularity. *Kidd v. Phillips*, 633.
- What not final judgment for purposes of appeal. See *Cameron v. Eq. Life Ass. Soc.*, 628.
- Ejectment, what is such a judgment in, as is described in 2 R. S. p. 309; effect of judgment in. See *Phyfe v. Masterson*, 338.
- Judgment creditors, rights of as to each other, regulated and en-

forced, and inequitable impediments to their legal rights removed, by court of equity. See Clapham v. McGuire, 521.

Interlocutory judgment in action for accounting, when and how entered; what may be considered on motion for. See Hathaway v. Russell, 538.

Interlocutory judgment, when not reviewable on appeal from final judgment. See Cameron v. Eq. Life Ass. Soc., 628.

Assessment to be considered a judgment, when. See Strusburg v. Mayor, 508.

See ESTOPPEL, 2; RES ADJUDICATA; TAXES, &c., 4.

JURISDICTION.

When party estopped from denying. Hovey v. McDonald, 606.

See BANKRUPTCY, 5-7; COURTS.

JURY.

The jury are entitled to draw inferences from the probability of defense as testified to by defendant's witnesses. Wygant v. Natl. B. & T. Ins. Co., 107.

LANDLORD AND TENANT.

1. An agreement to repair in no way contemplates, as damages for a breach of the same, such as might result from destruction to life, or injuries to the person or property, that might result from the omission to repair, as provided in the agreement. *Arnold v. Clark, 252.*
2. A landlord is not liable to his tenant as in tort, for his refusal or neglect to repair the premises as provided in his agreement to repair, &c. *Ib.*
3. The liability of a tenant holding over his term for a specified rent, under the Revised Statutes, is based upon the fact that the tenant took possession originally under a lease made. *Davies v. Mayor, 373.*

Counterpart of the indenture introduced in evidence, presumed to be properly executed, when.

Indenture of lease signed by defendant alone, as lessee, in which plaintiff's agents are described as landlords, with word "agents" after their names, enforceable by principals as landlords, when. See Nicoll v. Burke, 75.

Lease by City of New York, how made. See Davies v. Mayor, 373.

Possession of landlord, when not interrupted by temporary recognition of stranger as landlord. See Donahue v. O'Conner, 278.

LIENS.

Conversion, when lienor liable for. See Hovey v. McDonald, 606.

Conversion, action for will not lie upon proof merely of demand and refusal, though refusal be based on claim of lien.

Lien of mortgage, agreement to waive, effect of same, and of record thereof. See Bk. for Sav's v. Frank, 404.

Vendor's lien, exists when. See Lea v. Fabbri, 361; Kendall v. Niebuhr, 542.

See RES ADJUDICATA, 2.

LIMITATION OF ACTIONS.

1. This statute, when applicable, is something more than presumptive evidence of payment. It is a complete bar to the recovery of the debt, and no admission of the debtor will avoid the discharge unless under circumstances that indicate an acknowledgment of the debt, and willingness to pay the same. An express promise to pay, however, is not necessary, when the same can be implied from the acknowledgment of a present indebtedness. *Fiske v. Hubbard, 331.*
2. In this case, the defendant wrote a letter to the plaintiff, which contained the following state-

ments in regard to the debt in question: "I am well aware that I owe you for money borrowed." "As you have the figures, I wish you would at your leisure make out a statement of what you consider my indebtedness to you, and send it to me, resting assured that in all money matters I want to act honestly toward everybody." *Held*, by the court, that these statements of defendant to plaintiff in that letter were a sufficient acknowledgment of a present indebtedness, and from which a promise to pay might be implied. *Ib.*

2. S., being liable for a debts of a firm, whether as a partner *inter se* or *quoad* third persons, after the firm went into liquidation, gave to a partner of the firm an amount of money, to be applied by him towards the payment of the debts of the firm, such partner agreeing to ~~pay~~ the debts in full; such partner made a part payment on a claim against the firm. *Held*, sufficient to take the case out of the statute of limitations as to S. This, though the claimant may have received no part of the identical money furnished by S.; and though the whole of the money so furnished may have been applied to the payment of other firm liabilities before any payment on the claims in suit. *Burnett v. Snyder*, 577.

MALICIOUS PROSECUTION.

1. Upon a given state of facts, the question as to whether there was probable cause is one of law, to be decided by the court. *Kingsbury v. Garden*, 224.
2. A conflict of evidence as to the facts, must be disposed of by the jury, and therefore the cause must go to the jury under proper instructions from the court as to their duty to find probable cause, or want of probable cause, according as they may determine the facts. *Ib.*

3. Merely showing that counsel, after a full and fair statement to him of all the facts, advised the prosecution, without showing the further element that the party in good faith acted on the advice, is insufficient of itself to show probable cause. *Ib.*

4. Malice is a question for the jury, and cannot be inferred solely from want of probable cause. *Ib.*
5. A determination of prosecution by discontinuance by consent, *semble*, not sufficient to support an action for malicious prosecution. *Ib.*

MASTER AND SERVANT.

Where the master abdicates the control and management of certain work in favor of an employee, and gives him full discretion in regard thereto, he is liable for the neglect of said employee, in the performance thereof, to the same extent that he would be liable for his own neglect. This though the party injured thereby and seeking redress was also employed by him as a workman engaged in the same matter and under the control of said employee. The rule is not affected by the fact that the master has exercised due care in the selection of the person assigned to said duty. *Heiner v. Heuvelman*, 88.

See DAMAGES, 2.

MAXIMS.

Allegans contraria non est audientus. *Hazewell v. Courson*, 22.

Ex turpi causa, non oritur actio. *Solinger v. Earle*, 604.

Nemo dat quod non habet. *Farmers', &c. Bank v. Hazeltine*, 576.

Qui sentit commodum, sentire debet et onus. *Cooper v. Platt*, 242.

MISTAKE.

See REFORMATION OF INSTRUMENTS.

MONEY HAD AND RECEIVED.

1. When an agent of a bank, without authority, either because the authority has not been conferred by the bank as a fact, or because it has no power under its charter to confer such power, pays away its money to an officer and agent of another bank for his bank, and such officer knows that there is no authority to pay the money and that his bank has no right to take it, he is liable personally for the money, whether or not he is paid it over. This is the general rule. *Query.* Whether he would be liable, if the payment was made to satisfy a claim made *bona fide*, although its character be such that in a case made between the principals it might turn out to be unfounded. *Am. Nat. Bank v. Wheelock*, 205.
2. "As a general rule, the question is, to which party *ex æquo et bono* does the money belong." This action is "denominated an equitable action, and is less restricted by technical rules than most others." It aims at the mere justice of the case, and looks entirely to the question whether the defendants hold money, which in equity and good conscience belongs to the plaintiff. *Long v. Russell*, 434.
3. *Held*, in this case, that the defendant received money which in equity and good conscience belonged to the plaintiffs. They came into its possession by a misappropriation of it by plaintiff's factors and agents. The latter, as between themselves and their principals, had no right to, nor interest in, such moneys, except as the trustees of the plaintiffs. The defendants did not part with any consideration, nor incur any liability; nor did they release any right or property, for or on account of its payment to them. *Ib.*

See PLEADING, 6, 7.

MORTGAGES.

1. An assignee of a mortgage must take it subject to the equities attending the original transaction, and such equities may exist in favor of the mortgagor, or in favor of third persons. The assignee cannot defeat such equities by showing that he is *bona fide* purchaser for a valuable consideration. It is immaterial that he had no notice of their existence at the time of the assignment. But where a mortgage had a valid inception as a subsisting and enforceable lien in the hands of the mortgagee, to the full extent of its face, equities arising thereafter stand upon a different footing, and must be disposed of upon such other principles of public policy, or according to such statutory requirement, as the facts of the particular case may call for. *Bank for Savings v. Frank*, 404.
2. An assignment of a mortgage is a conveyance within the meaning of the statute, and since the Revised Statutes of 1830, the first assignee of a mortgage, in order to protect himself against a subsequent *bona fide* purchaser of the mortgage (whose assignment may be first recorded), must record his assignment. The protection of the statute extends only to purchasers in good faith and for a valuable consideration, parted with on the strength of the conveyance; nor is the parting with such valuable consideration sufficient in the absence of good faith, which cannot be said to exist in case of notice of a prior conveyance, &c. *Ib.*
3. In the case at bar, an agreement for a valuable consideration was made between the plaintiff and defendant's assignor, by which defendant's said assignor agreed to waive the priority of his mortgage upon the premises in question (being the mortgage thereafter sold by him to defendant) in favor of a mortgage to be

- given upon the same premises to the plaintiff. *Held*, that such an agreement is not entitled to be recorded under the statutes, and if recorded, is not constructive notice to any one; but if so entitled, it should be recorded in the book of mortgages. Whether such a contract as the above, which stands unrecorded in law, does, in view of the facts in this case, run with the mortgage, so that the mortgagee cannot subsequently assign, even to a *bona fide* purchaser for full value, more than his own rights, *quære*. But the court held, in the case at bar, that the knowledge the defendant had of the above agreement, through his attorney, was equivalent in law to notice. *Ib.*
4. Where premises are conveyed, "subject to a certain mortgage on the southerly portion of the same," made by the vendor, which mortgage the vendee assumes and agrees to pay, by a clause in the conveyance, which states that the amount of the debt has "been deducted from the consideration hereinbefore expressed," there is no equitable lien upon the mortgaged premises in favor of the vendor; this, though the vendee, after paying interest for a certain time, make default, and allow the mortgage to be foreclosed, and the vendor to be thereby charged with a judgment for deficiency. The assumption of the mortgage is, *pro tanto*, the consideration. *A fortiori*, there is no equitable lien upon that portion of the premises not covered by the mortgage. *Lea v. Fabbri*, 361.
 5. Break in chain of covenants does not necessarily render subsequent covenants inoperative, when the subsequent covenant is a clear express one to pay the mortgage. *Real Estate Trust Company v. Balch*, 528.
 6. General rule as to discharge of part of premises aliened by operation of a release of the part retained does not operate, unless the releasor has knowledge of the fact of the alienation or notice sufficient to put him upon inquiry. *Kendall v. Niebuhr*, 542.
 7. In such case the record of the deed of itself is not notice; but where it appears that the deed was recorded before the release was given, that the releasor employed an attorney to make the necessary searches and prepare the release, who did make the searches, and found various conveyances (there being ten several lots released), and reported the result to his client, and the attorney, being called as a witness, did not, by his evidence, negative the presumption that he found the deed of the lot in question on record. *Held*, sufficient notice to the releasor, although he testified that he could not recollect that he was informed of the conveyance of the lot in question. *Ib.*
 8. Such release does not operate as a discharge from so much of the debt as remains after applying thereto the value of the lands released, even though the releasor had notice of the alienation. *Ib.*
 9. Under the circumstances in the above case, and it further appearing that the deed to defendant was made in payment of materials, &c., theretofore supplied by them to the vendee, which were used for, and upon the houses. *Held*, that the contract between the vendee and vendor constituted an equitable mortgage and a specific lien for the said sum \$1,770, on defendant's lot, and the vendor was in this aspect entitled to a judgment of foreclosure and sale. *Ib.*
 10. Mortgagee can, without foreclosure, recover on a promise to pay the mortgage, made by a third party, for consideration, to the mortgagor, and mortgagor is not a necessary party. Such a promise may be made and enforced with-

out any consideration moving from the mortgagee. Where several parties are liable to the mortgagee in different amounts, under their agreements with each other, an action can be maintained against them all in equity, and a judgment rendered therein, according to the facts established therein against them all, according to their joint or several liabilities. *Hund v. Kennedy*, 335.

See ESTOPPEL, 3-5; FORECLOSURE.

MOTIONS AND ORDERS.

Order that attorney disclose residence, occupation and address of client, when made. See *Corbett v. De Comeau*, 588, 637.

Costs of motion, when chargeable on attorney. See *Jordan v. Shoe and Leather Bank*, 423.

Order that answer be made more definite and certain, when appealable. See *Hughes v. Chicago, &c. Ry. Co.*, 114.

Order overruling demurrer, and that defendant have leave to answer, &c., not appealable. See *Garner v. Harmony Mills*, 148; *Cameron v. Equitable Life Assurance Society*, 628.

Costs of appeal from order, when not awarded. See *Hesse v. Briggs*, 417.

When appellate court may make order permitting appellant to ask leave of court below to present the matter in a new aspect, affirming order appealed from if such application below be not made, &c. See *Koch v. Purcell*, 162.

Motion for new trial based on decision of trial judge, on application for postponement, when and how made. See *Gallaudet v. Steinmetz*, 239.

Motion for interlocutory judgment in action for accounting, what may be considered on. See *Hathaway v. Russell*, 538.

Order reducing charge for disbursements, when not appealable. See *Corbett v. De Comeau*, 587.

Motion for extra allowance, where made; order allowing, appealable. See *Mills v. Watson*, 591.

Order for alimony and security therefor, when enforceable by contempt proceedings. See *Gane v. Gane*, 355.

Orders and judgments distinguished. See *Garner v. Harmony Mills*, 148.

Order directing payment by receiver when conclusive on surety, though not a party to the proceeding. See *Thompson v. McGregor*, 197.

Authority to bring ejectment, when res adjudicata by order. See *Carpenter v. Allen*, 322.

MUNICIPAL CORPORATIONS.

Persons dealing with agent of municipal corporation, must learn the nature and extent of his authority. *Davies v. Mayor*, 373.

See NEW YORK CITY, 1-3.

NEGLIGENCE.

1. In this case, the plaintiff, in the course of her employment, was injured by a revolving upright shaft upon defendant's premises, in a portion of the same not under his control, but leased, with the steam power which drove said shaft, to a tenant, at a specified rent, by which said tenant the plaintiff was at the time employed. For the damages resulting from said injuries the plaintiff sought to charge defendant, upon the ground that he did "negligently and wrongfully leave said revolving shaft uncovered, uninclosed, and unprotected." *Held*, that the shaft in question was not dangerous in itself or in its working; the opportunity for damage would arise only in case a person should come in contact with, and be caught by it. *Ryan v. Wilson*, 273.

2. The defendant took no part, actually or by legal construction, in the tenant's omission to guard the shaft, he having parted with the possession and control of the

floor upon which the accident occurred, without stipulating for a continuance of the conditions which would render the occurrence of the accident possible or probable; nor was it negligence on his part to leave the placing of the guard to the tenant, a person as competent to attend to it as himself, and whose interest and duty would impel him to do it. *Id.*

See AGENCY, 7; BILLS, NOTES, &c., 1; CARRIERS, 2; DEATH, ACTION FOR, &c.; MASTER AND SERVANT; WAREHOUSEMEN, 1-4.

NEW TRIAL.

Questions appearing on the face of the record, which the court of appeals, in its reversal of the judgment appealed from, do not pass upon, but which, if they had substance, would lead to an affirmance, must be regarded on a new trial ordered by that court (when the questions are for the first time raised), as of no substance. *Wehle v. Conner*, 598.

When and how motion for, may be made, based on decision of judge at trial, on application for postponement. See *Gullvulet v. Steinmetz*, 239.

Refusal to charge request as to question of damages, when ground for granting new trial. See *Huremeyer v. Huremeyer*, 464.

Action for ejectment, when new trial granted in. See *Phyfe v. Master-son*, 333.

See TRIAL.

NEW YORK CITY.

1. The resolution of the board of supervisors is not sufficient to authorize a lease to be made to the mayor, aldermen, and commonalty of the city of New York. This can only be done by a resolution of its legislative body, namely, the common council,

and for a period not exceeding five years (*Charter*, § 18). *Davies v. Mayor*, 373.

2. The board of supervisors cannot legislate in behalf of the city. Persons dealing with the agents of a municipal corporation must learn the nature and extent of such agents' authority. *Id.*

3. The recorder has no authority, by his own independent action, to impose any liability upon the city, and his act, in continuing in possession of the premises beyond the time for which rent was paid, was unauthorized, and no claim against the county or city of New York can be predicated thereon. *Id.*

4. In case of award of damages under chapter 52 of the Laws of 1852, made to a certain named person by the board of assessors, and part paid by the comptroller, with the assent of such named person, to the collector of assessments and clerk of arrears, in discharge of certain assessments for certain improvements theretofore laid upon the property, in respect whereof said award was made, and balance paid under the provisions of said chapter to the city chamberlain,—a claimant in opposition to the person named in the assessment list as entitled thereto, has no action against the mayor, etc., for the part paid to the collector and clerk of arrears; but he has an action against the chamberlain for the part remaining in his hands. *Hatch v. Mayor, &c.*, 599.

5. *Held*, that the proceedings herein upon the tax sale to defendant were irregular and defective, and the lease was therefore void. 1. With respect to the lands in question, the statutory notice published did not state on what particular day they were sold. It stated that the lands described in an accompanying list were sold on the 9th, 12th, 18th, and 25th days

of March, 1874 (without specifying what lands were sold on the different days) and that, unless redeemed on or before two years from the date of the respective sales, which will be on the 9th, 12th, 18th, and 25th days of March, 1876, the mayor, &c., would execute a lease to the purchaser. The statute speaks of a "certain," not an uncertain day. 2. The notice to owners and occupants, which the statute requires shall be given by the "grantee" to whom the premises "shall have been conveyed," was never served upon the plaintiff, the owner of the premises, and was served upon the occupants and the former owner before the premises were conveyed, which service, so far as made, was therefore premature and ineffectual. *Donahue v. O'Connor*, 266.

6. The statute requires that notice of sale (for taxes) shall be published in ten different newspapers of New York city. *Held*, that a publication of the same in a paper printed in the German language, as one of the above number, will not invalidate the notice. *Ib.*

See EASEMENT, 4; EXAMINATION BEFORE TRIAL, 6; TAXES, &c.; UNDERTAKING, 3.

NOTICE.

Motion for new trial in ejectment, when notice insufficient. See *Phyfe v. Masterson*, 338.

When record of deed, sufficient notice to releaseor, to put in effect rule as to discharge of part of premises aliened, by operation of release of part retained. *Kendall v. Niehuhr*, 542.

Publication of notice in German newspaper, as one of the ten required by the statute, held not to invalidate notice in tax sale. See *Donahue v. O'Connor*, 278.

Record of agreement to waive lien of mortgage, not constructive notice.

Equities attending inception of mortgage and arising thereafter distinguished, effect of notice of.

Prior assignments, effect of notice of to party purchasing mortgage. See *Bank for Savings v. Frank*, 404.

See APPEAL, 17; CONTRACTS, 3; PARTNERSHIP, 1; PAYMENT, 2.

OBJECTIONS AND EXCEPTIONS.

See APPEAL, 4, 10, 14, 15; EXAMINATION BEFORE TRIAL, 2; FORECLOSURE, 4; TRIAL, 4, 5.

PARTIES.

1. One authorized by the court to sue, the bond given by the receiver, running to the People of the State of New York, may be plaintiff. *Thomson v. McGregor*, 197.

2. A receiver appointed in the place of one removed, may sue on the bond given by the removed receiver; he is the party in interest. *Ib.*

3. Under the Code, a plaintiff is the real party in interest when he has a valid transfer, and holds the legal title to the demand that is the subject of the action. It is not necessary that there should be any valuable consideration for the transfer or indorsement of the demand to the plaintiff. The defendant is fully protected by a payment of the same, on a recovery by the assignee or indorsee of the demand. The grounds of reversal by the court of appeals, of the case of *Hays v. Southgate* (10 Hun, 511) not applicable to this case. *Freeman v. Falconer*, 383.

4. In an action for reformation of instrument, omission of one of the parties to the instrument may be cured by the written consent of the party omitted. *Real Est. Trust Co. v. Balch*, 528.

Mortgagor not a necessary party to action on promise of third party

to pay the mortgage, when. See *Hand v. Kennedy*, 885.
 Order directing payment of money by receiver after his removal, surety liable for disobedience of receiver, though not party to proceeding resulting in order. See *Thompson v. McGregor*, 197.
 Action for conversion, necessary party in. *Dows v. Kilder*, 639.

See AGENCY, 3.

PARTNERSHIP.

1. In this case the following propositions were laid down, and their legal conclusions held: the 1st and 2d were held to be in full accord with the general rule, applicable to individual indorsers, and the 3d and last was founded on the law merchant: 1. When a party takes negotiable paper, made, accepted or indorsed by one of several partners, in or with the partnership name, and the fact that such name was not signed or indorsed in the regular course of the business of the firm is apparent on the face of the instrument, or necessarily implied in the nature of the transaction, such party cannot, though he may have parted with value on the faith of the paper, charge the other members of the firm, except upon proof that they assented to the transaction. In every such case he is chargeable, as matter of law, with notice of want of authority in the individual partner to bind the firm without their express assent. 2. When the fact, though existing, that such name was not signed or indorsed in the regular course of the business of the firm, is not apparent from the face of the instrument, and the nature of the transaction appears to be susceptible of different conclusions, the question of notice is one of fact, to be determined by the jury upon all the circumstances. In every such case, the burden is again upon the plaintiff,

though he may have parted with value, to satisfy the jury, either that the circumstances of the case did not constitute notice to him, or that, if they did, the other members of the firm assented to the transaction. 3. When the fact, though existing, that such name was not signed or indorsed in the regular course of the business of the firm, is not apparent from the face of the instrument, and the nature of the transaction appears to have been of such a character as to give the plaintiff a right to suppose that it was a partnership transaction, the members contesting their liability must not only show that in fact it did not constitute such a transaction, but also that the plaintiff had in some way actual notice thereof. In every such case, the burden is shifted upon the defendant to establish notice. *St. Nicholas Bk. v. Saery*, 97.
 2. The capital furnished by special partners must be cash. Their uncertified checks upon a bank, in which, at the date of the checks, they have not money sufficient to meet and pay their checks, cannot be deemed cash, although, before the checks were presented, they had arranged or provided funds to pay the same, and they were paid. *Maginn v. Lawrence*, 235.
 3. Any false statement in the certificate or affidavit filed, makes all the persons interested in said partnership liable, as general partners. *Id.*
 4. It clearly appearing in this case that the affidavit of one of the general partners, filed with certificate, was false, in regard to the statement that each of the special partners had paid in \$20,000 cash, the parties to the partnership were all held liable as general partners. *Id.*
 5. Where, by the terms of the agreement, the defendant furnished the capital stock, and the plaintiff contributed his skill

and service, and the profits of the copartnership were to be equally divided, the plaintiff is not to be entitled to any part of the capital stock, on a settlement of the affairs of the partnership. He has no interest in any part of the capital excepting so far as, in the progress of the business, the same may have been converted into profits. *Conroy v. Campbell*, 323.

6. In a partnership agreement the following clauses occurred: 1. One providing that one of the partners shall contribute towards the capital the assets of a former firm represented on the books of that firm as bills due, or to become due (nothing being said in the agreement about the value of said assets--their nominal value however, was \$16,169.36, and real value but \$3,876.75), and that the other partner should put in \$14,000 in fact he only contributed \$11,818.90). 2. One providing that the profits should be shared, and all losses borne and paid equally. 3. One providing that each partner might draw weekly a certain specified sum for his own use (each drew in excess of the specified sum). 4. One providing that at the termination of the partnership, the remaining assets should be divided between the partners, to each his proper and respective proportion, reference being had to the capital stock put in and invested by them respectively. Accounting under such agreement, on its termination should be conducted on following principles, where there has been a loss: 1. The amount of capital which plaintiffs failed to put in should be treated as assets. 2. The excess drawn by each partner, for his own use, should be treated as assets. 3. The amounts collected by each partner, and retained by him, should be treated as assets. 4. The amount of the losses (no part

thereof having been paid back into the firm by either partner), should be treated as assets. 5. The sum drawn by one partner for his own use, in excess of that so drawn by the other, cannot be charged against the former, in favor of the latter, for equalization. 6. The partner putting in the assets of the former firm, must be regarded as having contributed to the capital stock only the actual value thereof. 7. The total amount of assets (including therein the first four items above mentioned) should be divided between the parties in the proportions as \$14,000 is to \$3,876.75, and each party should be considered as having received on account of his share, the amount he had omitted to pay over under his obligation to share equally the losses, i. e., one half of the losses. *Schulte v. Anderson*, 489.

7. An agreement was made between several, that certain of their number should be named as copartners in partnership articles, and that the other should have a certain proportion of the interest of certain of those so named, which agreement was carried into effect. *Held*, it appearing that it was the mutual desire of all that those not named in the articles should be interested as partners, and that it was their common opinion that the interest of the firm would be best subserved by those, not to be named in the articles, not appearing to the world to be partners; and it also appearing that the above mode was adopted to accomplish the desired result: that it was the intent of all the parties, including Snyder, that he should, as between themselves, have the interest of a partner; and that the form of the written contracts drawn and executed could not prevent the liability of a partner

attaching to Snyder, as between him and third persons dealing with the firm, while this relation existed. *Burnett v. Snyder*, 577.

8. Such an arrangement does not present a case where, after the firm is formed, one partner forms a sub-partnership, which, when it becomes known to the others, is neither approved nor disapproved of by them, as was the case in *Burnett v. Snyder*, 43 *N. Y. Super. Ct.* 238. *Id.*

Payment on account by one partner after firm has gone into liquidation, effect on another partner, as to statute of limitation. See *Burnett v. Snyder*, 577.

PAYMENT.

1. The bare receipt of a check drawn by the depositary on account of the deposit upon a bank, and at the request of the depositor made payable to a third party, and delivered to the depositor, will not discharge the liability of the depositary. The depositary, upon returning the check undorsed, in such a state that the depositary's rights had not been changed to his harm, and without having dealt with it in a way that had damaged the depositary, has still the right to demand the money on deposit. *Thomson v. Bank of N. Am.*, 1.
2. In such a case as the above, a bare retention by the depositor for any period less than six years, the bank remaining solvent, will not discharge the depositary, and payment by bank, if made on a forged indorsement, will not. Acquiescence of depositor in payment by bank, will not, if the payment was on a forged check, although, the forgery being unknown to the depositor, the acquiescence continued until the statute of limitations would prevent a recovery from the bank. Depositor being ignorant of the forgery, want of notice by him will not

alter the effect of the acquiescence. *Id.*

PLEADING.

1. This action was brought to compel the defendants to account as the general agents of the assignor of the plaintiff. The complaint, although containing many specific allegations in regard to the matters and business of said agency, in truth sets up but one cause of action, and there is no improper joinder of causes of action, arising out of the agreement, with claims for wrongful conversion, as the demurrer suggests. *Walker v. Spencer*, 71.
2. A demurrer will not lie to the prayer for judgment in the complaint. That the plaintiff has an adequate remedy at law is no ground of demurrer. *Id.*
3. The parts of the answer objected to are confined to denials, and the substance and form thereof. There is no attempt to claim any affirmative right from the plaintiff. In no instance in which the order directs the amendment of the answer, is there any doubt or uncertainty that the answer either puts in issue or admits the corresponding allegations of the complaint. *Held*, that no amendment is possible which would make the denial or admission any clearer, and the defendant should not and cannot be compelled to submit to the constructions which the plaintiff makes in the complaint of the trust deed, which was the foundation of the action. *Hughes v. Chicago, &c. Rv. Co.*, 114.
4. The complaint alleges no more than "that although often requested so to do, the said Garrison has refused and does refuse to fulfill his said contract and agreement with the plaintiff, and to issue or cause to be issued and delivered to the plaintiffs

- thirty six thousand shares of stock in said company, in exchange for the stock of the Pacific Railroad, so as aforesaid held by the plaintiffs." This allegation does not allege a fact so much as an opinion of the pleader, that something said or done, but which is not stated, was a refusal to comply with defendant's part of the contract. The omission to state when and where the request was made may be deemed as only indefinite and uncertain, but the omission to state by whom the request was made is probably substantial. *Marie v. Garrison*, 157.
5. In this case there was stock to be delivered by the plaintiff, and until the plaintiff, being ready, tendered *in presenti* their stock, the defendant was not bound by the contract to deliver his. The pleading must allege the tender, or must show something sufficient as an excuse for not tendering. An absolute refusal of the party on one side to perform and fulfill a contract is a sufficient excuse to the other side for not making a tender, when a tender is necessary; but the complaint must allege and show the fact, that there was such a refusal, and that the omission to tender was occasioned thereby. In case of refusal that excuses a tender, still there can be no recovery unless it appears by the pleading that the party so excused was ready and able to tender. *Ib.*
6. In an action for money had and received, (1) a form in substance like the former common count, alleging money had and received by defendant to and for the use of plaintiff, is sufficient; or (2) The complaint may set forth the special circumstances which create the liability. Under the first form, any special circumstance which creates the liability may be proved. Under the second form, the plaintiff is confined to proof of the special circumstance alleged. *Am. Nat. Bk. v. Wheelock*, 205.
7. In such an action a complaint merely alleging that defendant, without any consideration therefor, did obtain the money from plaintiff, is insufficient. It is not equivalent to stating that the money was received for the use of plaintiff. When the complaint contains allegations showing the manner in which the money was obtained, the allegation of no consideration must be considered as made in reference thereto, and as being substantially an allegation that by reason of the matters so alleged there was no consideration. *Ib.*
8. A pleading upon information and belief cannot be stricken out as sham, unless it clearly appears that there could not have been any information or belief. The principles stated in *Wayland v. Tyson* (45 N. Y. 281), and *Thompson v. Erie R. Co.* (45 *Id.* 468), prevent an affirmative defense being stricken out as sham upon affidavits. *Webb v. Foster*, 311.
9. A complaint alleged that plaintiff is the owner of, and entitled to the immediate possession of certain property of a specified value; that defendant became possessed thereof wrongfully, and plaintiff demanded the delivery thereof to him, which was refused, and defendant converted the same to her own use; and prayed the delivery of the property, with a specified amount for damages for its detention. *Id.*, to present an action for claim and delivery. *Banfield v. Haeger*, 428.
10. In construction of complaint, as determining what action is presented thereby, allegations unnecessary to entitle plaintiff to the relief he asks may be disregarded as superfluous. *Ib.*
11. Adding the word "executor," &c., or "executors," &c.; to the name of parties to an action, may be treated as mere *descriptio*

persons and surplusage, when nothing appears in the summons or complaint indicating the intention of the plaintiff to charge the defendants in their representative capacity. *Bannon v. McGrane*, 517.

When relief in case of indefinite and uncertain pleading, should not extend to permission to move for judgment, in case of failure to amend. See *Hughes v. Chicago, &c. R.R. Co.*, 114.

POOLING AGREEMENT.

See *Havemeyer v. Havemeyer*, 464.

POSSESSION.

1. The defendant, not having an absolute and perfected title, his act in entering upon the premises and collecting rent from the tenants was not an interruption of the plaintiff's possession. Though the tenants, for a few months, recognized the defendant as landlord, they subsequently resumed their proper relations to plaintiff, which have continued ever since. *Donahue v. O'Connor*, 278.

PRACTICE.

See **APPEAL**, 2-4, 7, 9, 10, 12, 14, 15-17; **COSTS AND ALLOWANCES**, 6; **EXAMINATION BEFORE TRIAL**; **JUDGMENTS**, 3; **TRIAL**.

PRESUMPTIONS.

See **BANKS, &c.**, 3; **EVIDENCE**, 1; **TAXES AND ASSESSMENTS**, 1.

PUBLICATION.

The statute regarding tax sales, requires that notice of sale shall be published in ten different newspapers of New York city. *Hell*, that a publication of the same in a paper printed in the German language, as one of the above number, will not invalidate

the notice. *Donahue v. O'Connor*, 278.

QUESTIONS OF FACT AND OF LAW.

See **MALICIOUS PROSECUTION**, 1, 4; **PARTNERSHIP**, 1; **WAREHOUSEMEN**, 4.

REAL ESTATE.

Action to determine conflicting claims to, what may be determined in. *Donahue v. O'Connor*, 278.

See **EASEMENTS**.

RECEIVERS.

1. In case of non-payment by receiver, pursuant to order, made after receiver's removal ordering him to pay a certain sum, "being balance of trust funds in his hands," the surety is liable for the amount ordered to be paid, although not a party or privy to the proceeding resulting in the order. *Thomson v. McGregor*, 197.

2. The surety in such case cannot defend, either wholly or in part, on the ground that the receiver before the execution of the bond, had disposed of, or since its execution had properly disbursed the whole of the trust funds, or of a part thereof, so that the whole of the sum mentioned in the order was not at its date in his hands. The order is conclusive on him. Condition of bond in this case was: "Now the condition of this bond is such that if the said . . . shall henceforth faithfully discharge the duties of his trust as said receiver, then this obligation to be void, otherwise to be in full force and effect." *Id.*

3. A receiver appointed in the place of one removed, may sue on the bond given by the removed receiver; he is the party in interest. *Id.*

See **BANKS AND BANKING**, 6.

RECORDING ACT.

See MORTGAGES, 2, 3.

REFERENCE.

Issues in an action for damages for fraud and deceit cannot be referred for hearing and determination without consent of parties. But when the complaint sets forth an action on a contract, and it appears that the trial thereof involves the examination of a long account, the defendant cannot defeat a reference by a tender of an issue of fraud in the transaction, and a claim for damages therein, in the way of recoupment or counter-claim. *Verplanck v. Kendall*, 525.

Objection that no demand has been proved cannot be raised on filing exceptions to report. See *Burnett v. Snyder*, 582.

Reference to hear and determine issues in an action for an accounting, issues not involving taking of account; duty of referee upon practice upon, confirmation of report, interlocutory judgment. See *Hathaway v. Russell*, 538.

See FORECLOSURE.

REFORMATION OF INSTRUMENTS.

Where it clearly appears that a clause inserted in an agreement is contrary to the agreement pursuant to which the instrument was given, and contrary to the intention of the parties to the agreement, and was inserted in the instrument through the mutual mistake of all the parties thereto, and the party on whom the clause imposes a liability, satisfactorily accounts for his non-discovery of its insertion, the instrument may be reformed by striking out the clause, unless an estoppel has arisen in favor of a third party. *Real Estate & T. Co. v. Balch*, 528.

See PARTIES, 4.

RELEASE.

Involuntary release of mortgaged premises, rule as to stated and applied. See Kendall v. Niebuhr, 542.

RES ADJUDICATA.

1. On a motion of defendant, that the summons and complaint, in an action of ejectment be dismissed, on the ground that the attorneys for the plaintiff had not sufficient, or any authority, to institute the action in behalf of plaintiff (under 2 R. S. 2 ed. 314, § 20), it appeared from the motion papers, that defendant had previously obtained an order in the same action, that plaintiff's attorneys show cause why they should not be compelled to produce their authority from the plaintiff for commencing this action; that on the return of said order to show cause, the affidavit of the plaintiff was filed and read, in which plaintiff stated in substance that he had instructed the attorneys who appeared in his behalf to bring the action in his name against the defendant, and said authority was deemed sufficient by the court and so declared by its order. The court held, on this motion, that in the former proceedings this court had declared that sufficient authority for the commencement of this action, by the plaintiff's attorneys, appeared in the affidavit of the plaintiff; that such adjudication was final until reversed on appeal; and that it cannot be reviewed on this motion, subsequently made in this action. *Carpenter v. Allen*, 322.

2. In an action commenced by a licensee against a lienor, to have his lien adjudged valid, and enforce payment thereof, the lienor appeared and answered; his answer was struck out by the court, and final judgment

given in favor of the plaintiffs, directing the lienor to pay to the plaintiffs the amount claimed by them, and adjudging that plaintiffs have a lien, as claimed by them. *Held*, in an action by the licensee against the lienor, for a conversion of the subject of the lien, that the judgment in the action to have the lien adjudged valid, barred the lienor from contesting the existence of the lien or the validity of the contract under which it was claimed. *Hovey v. McDonald*, 606.

See BANKRUPTCY, 5.

REVISED STATUTES AND SESSION LAWS.

- 1 R. S. 591, §§ 1, 10, 601. Liability directors for dividends illegally declared. *Van Dyck v. McQuade*, 620.
- 1 R. S. 744, § 3. Attornment of tenant to stranger. *Donahue v. O'Connor*, 278.
- 1 R. S. 756. Recording act. *Bank for Savings v. Frank*, 404.
- 1 R. S. 765, § 8. Limited partnership. *Mugin v. Lawrence*, 235.
- 2 R. S. 148, § 60. Order for support of wife, &c., how enforced. *Gane v. Gane*, 353.
- 2 R. S. p. 300, §§ 36, 37. New trial in ejectment. *Phyfe v. Masterson*, 338.
- 2 R. S. 313. Proceedings to determine claims to real property. *Donahue v. O'Connor*, 278.
- 2 R. S. 573, § 20. Authority of attorney to bring action in ejectment. *Carpenter v. Allen*, 322.
- 2 R. S. 407, § 80. Admission of members of corporations as evidence. *St. Nich. Bk. v. Savory*, 97.
- 2 R. S. 447, §§ 1, 2. Claims which pass to personal representatives. *Hyde v. Tufts*, 50.
- 2 R. S. 507, § 1. Entry on lands. *Donahue v. O'Connor*, 278.
- 2 R. S. 523, § 36. Declaration in replevin. *Banfield v. Haeger*, 428.
- 4 R. S. (Edm. ed.) 210. Liability of stockholders for dividends illegally declared. *Van Dyck v. McQuade*, 620.
- Laws 1852, c. 52. Awards for changing grade of streets, New York city. *Hutch v. Mayor, &c.*, 599.
- Laws 1858, c. 338. Review of assessment in New York city. *Strusburg v. Mayor*, 508.
- Laws 1862, c. 484, § 8. Remedy against marshals, &c. *Ennis v. Broderick*, 92.
- Laws 1869, p. 788. Yorkville Savings Bank. *Van Dyke v. McQuade*, 620.
- Laws 1871, c. 381. Tax sales. *Donahue v. O'Connor*, 278.
- Laws 1871, c. 574. Notice of tax sale. *Phyfe v. Masterson*, 338.
- Laws 1873, c. 335, § 111. Publication of legal notices. *Donahue v. O'Connor*, 278.
- Laws 1875, c. 371. Savings banks. *Van Dyck v. McQuade*, 620.
- Laws 1875, c. 371, § 25. Interpleader, savings banks. *Bowery Savings Bank v. Mahler*, 619.

RIGHT OF WAY.

See EASEMENTS.

RULES OF COURT.

- Gen'l Rule 47. *Jordan v. Shoe & Leather Bank*, 423.
Ch. Rule 107. *Hathaway v. Russell*, 538.

SALE.

1. The following memorandum was signed by the defendant's intestate and delivered to the plaintiff, and forms the basis of this action: "Received of J. W. J., by agreement, one thousand shares of St. Joe Lead Stock, for which I have paid him \$3,000. The understanding is, that I am to give said J. one-half of whatever price the same is sold

for, when sold, over and above that sum." *Held*, that the above memorandum is evidence of an absolute sale of the property therein mentioned, and that, until the holder of the said property thereunder, who has the sole and exclusive right or disposal, elects to sell the same, the vendor can have no possible claim thereon; and that an action to compel the sale of the property, and a distribution of the proceeds, will not lie. Also, *held*, that to construe the language thus employed as imparting an intention on the part of either party to have the stock and its earnings held or sold for their joint benefit involve an interpolation of new matter at variance both with the terms and spirit of the contract. *Jones v. Kent*, 65.

2. K. having agreed with A. (the vendee) to buy the bills of exchange on August 12, for \$30,000, drawn against several bills of lading, including those of the property in question, paid A. \$17,000, on account of the purchase, and for the balance, say \$18,000, drew his check to A.'s order, which A. took and immediately indorsed back to K., as security for what he (A.) might be found to owe him (K.) on previous transactions, and K. passed it to the credit of A. in that shape, and thereafter received from A. the bills of lading against which the bills of exchange were drawn. Matters thus stood, as between K. and A., when the vendors to A. notified K. that the corn was theirs, and demanded a return of it, or that K. should account for its value or proceeds. *Held*, that K. was not a purchaser for value as to the \$18,000. If K., before demand on him, had transferred the title and control of the goods, it constituted a conversion, because he must, in that case, have himself received credit

for them. An action in nature of trover is proper in such case. A. is not a necessary party. The fact that, after plaintiff's demand, other parties made similar claims in respect to the goods covered by the other bills of lading, present no defense. *Dove v. Kidder*, 639.

See AGENCY, 9; TAXES AND ASSESSMENTS, 1.

SAVINGS BANKS.

See BANKS AND BANKING, 4-7; INTERPLEADER.

SECURITY.

See APPEAL, 7; DIVORCE.

SHERIFFS.

Upon taxation by the judge, the sheriff's bill was allowed at \$32.13 (for keeper's fees in charge of a schooner levied upon). *Held*, that this allowance to the sheriff was erroneous. The statutory fees and poundage allowed to a sheriff are in full compensation for his services and expenses in executing the writ. He is not entitled to charge for the services of a keeper, in charge of the property levied upon. *Townsend v. Ross*, 447.

SIMULATION OF LABELS.

See TRADEMARKS, &c.

SPECIFIC PERFORMANCE.

When will not be decreed, to compel sale of stock, under contract by which plaintiff has interest in proceeds. See *Jones v. Kent*, 66.

STAY OF PROCEEDINGS.

See UNDERTAKING, 1.

SURETIES.

In the case at bar, the defendant Moltz commenced an action in the court of common pleas, against the plaintiff Wettig, and

obtained an order of arrest. Defendants Schmidt and Specht executed with Moltz the usual undertaking. Afterwards, and during the absence of Moltz from the State, Wettig obtained a judgment for costs in the common pleas action against Moltz, for non-prosecution, and then commenced this action on the undertaking against the defendants, and obtained judgment therein. After this, Moltz moved in the common pleas, to vacate and set aside the judgment taken by default by Wettig against him, and the motion was granted. Subsequently, the defendants herein moved to vacate the judgment against them in this action, and for a new trial. *Held*, by the court, this motion for relief in this action was addressed to the discretion of the court, and should have been granted. Sureties are always entitled to equitable protection from the courts, and should never be compelled to pay in a case in which their principal is under no liability. *Wettig v. Moltz*, 389.

Failure of receiver to obey order made after his removal, directing payment of balance trust funds, makes surety liable though he was not a party or privy to the proceeding resulting in the order. See Thompson v. McGregor, 197.

TAXES AND ASSESSMENTS.

1. The legislature has power to enact that the production of a deed or lease given by the mayor, &c., upon a tax sale, shall be presumptive evidence of the title of the purchaser, and that all the statutory requirements have been complied with; but proceedings of the character in question, *i. e.*, tax sales, are to be closely scrutinized, and the provisions of the statute must be sedulously followed. *Donahue v. O'Connor*, 278.
2. Assessors, having jurisdiction, act judicially in fixing the amount

to be imposed upon the property benefited, and such an assessment is in fact a judgment. *Strusburg v. Mayor*, 508.

3. Such an assessment may be reviewed: 1. By the body or board who laid the same, upon a hearing of objections made thereto; 2. By the court on certiorari; and, 3. By the court, on petition, in certain cases in the city of New York, for fraud or irregularity under Laws of 1858, c. 338. Such an assessment cannot be questioned in a collateral action. As long as it stands unreversed or unvacated money collected under it, by the defendant, cannot be recovered back by action of the person against whom the assessment was made, and by whom it was paid. *Ib.*
4. In the case at bar, the complaint fails to show that the judgment recovered by the defendant against the contractor H. (for overpayment beyond the contract price), declared or made the assessment invalid, but that it determined simply the fact of overpayment to H. and defendant's right to recover the sum overpaid. Such a judgment furnishes a reason or ground for the reduction of the assessment upon a proper application, but is not tantamount to a reversal vacation of the assessment. *Held*, if the complaint further alleged that the judgment of the defendant against the contractor, H., had been collected, or that the latter was solvent, and the judgment was collectible, and that it remains uncollected through the fault of the defendant, this action could perhaps to some extent, be sustained upon the equitable arising upon the right of the plaintiff to sue in the fund collected, or to be collected; but in the absence of any such allegation, the complaint is clearly defective in not stating a cause of action. *Ib.*

Award damages under Laws 1852,

c. 52, made to certain person by board of assessors, and part paid by comptroller with consent of such person to collector of assessments, &c., in discharge of assessments on the property, and balance paid under the act to city chamberlain; remedy of one claiming such award in opposition to person named in assessment roll. Hatch v. Mayor, 599.

Tax sale, when held irregular for insufficiency of notice, &c. See Donahue v. O'Connor, 278.

TENDER.

What sufficient to excuse; how pleaded. See Murie v. Garrison, 157.

TITLE.

The plaintiff herein claimed title in fee to the premises in question, under the deed of a referee in foreclosure proceedings, which deed was dated June 3, 1876. The defendant claimed title to the same under a lease for sixty years, made by the mayor, &c., March 18, 1876, upon a sale for taxes. *Held*, that such a claim may be determined in an action like the present, which was brought to determine conflicting claims to certain real estate, under section 449 of the Code of Procedure, and 2 R. S. 313, and amendments. *Donahue v. O'Connor, 278.*

When party is stopped by judgment in a former action, from setting up, as against a purchaser under said judgment, another title than that therein established in said party's favor. See Cooper v. Platt, 242.

See TAXES AND ASSESSMENTS, 1.

TORTS.

Landlord not liable to tenant in tort, for failure to repair as provided by agreement. See Arnold v. Clark, 252.

See CHOSE IN ACTION.

TRADEMARKS AND LABELS.

1. In this case the following facts appeared: The labels used by defendants in their business were in undoubted imitation of those used by plaintiff, and the greater part of the details were so like the corresponding details of the plaintiff's labels, that it was plainly defendants' intention to represent that the goods upon which the same were to be placed were made by plaintiff. *Held*, that the plaintiff was entitled to protection against this. *Ind. Rubb. Comb Co. v. Rubb. Comb Co., 258.*
2. The manner in which defendants printed their name upon the labels in question was likely to draw attention, from the difference between it and plaintiff's name, and lead the ordinary reader to believe it to be plaintiff's name. *Held*, that in such case the intent being evident, the plaintiff is responsible for the effect produced, though the name used was its proper corporate name. *Ib.*
3. As to that part of the judgment herein against the use of portions of the labels, the court *Held*, whether a name can be a trademark or not, there is no doubt that a defendant may be enjoined from using a plaintiff's name. It was contended that plaintiff's name really expressed a kind of trade, and that, as the trade is open to all, there can be no exclusive right to words that intelligibly designate the same. But it appeared that there had been a purpose to use a name, in imitation of plaintiff's, on a label, and the case made it proper to consider whether there was not danger of a use of it apart from the same. No closeness of reasoning, based on the fact that it has never been used by itself, is called for in a case which discloses a meditated general wrong. Nor is it mate-

rial that the name is described in the pleadings and findings as a trademark. *Ib.*

4. As to the use of the numbers "2, 101" and "32," the principles of *Gillott v. Esterbrook* (48 N. Y. 375) apply. In that case and this, the numbers were selected arbitrarily, and were used to distinguish one pattern or character of goods from another, and the plaintiff is entitled to protection in his use of the same. *Ib.*

See INJUNCTION.

TRIAL.

1. A party should not be allowed to go to the jury in such form as that, in event of one claim distinctly interposed by him and sustained by his evidence, being rejected by them, he may fall back upon another position, upon which to rest a verdict wholly irreconcilable with the one disallowed, without sufficient evidence to support it. A party must be limited to a consistent statement of a claim. *Hazewell v. Cursen*, 22.
2. When counsel at the trial limits himself to a distinct position with reference to his client's rights, there is no error in confining him to such position. *Ib.*
3. The written statement of facts deemed established by the evidence, and the rulings of law desired thereon, which, under section 1023 of the Code of Civil Procedure, a party may submit to the judge at the trial, must, to be considered, be in the form of distinct propositions of law or of fact, or of both, separately stated; and in the same propositions should not be mingled indiscriminately statements of fact with conclusions of law. They must be prepared in such form that the court may conveniently pass upon them. *Sniffen v. Koehling*, 61.
4. If the defendants desired that the question whether they were to pay the commission as the money was paid to them, or not until they had been paid the full contract price of the work, be submitted to the jury, they should have requested it. The exception to the court's directing a verdict was not equivalent to a request. *Ormes v. Dauchy*, 85.
5. Exceptions to the judge's charge to the jury must be taken before the jury have rendered their verdict. It is not within the power of the judge presiding at the trial to allow exceptions to his charge, which were not taken before the verdict. *De Leon v. Echverria*, 240.
6. Where, under one of the aspects of the case as presented by the complaint, evidence was given (under objection as to its relevancy) as to a transaction between a plaintiff or his agent, and a third person named in the complaint, tending to show a great wrong committed on such third person, with a view of sustaining a charge made in the complaint, of a conspiracy between the defendant and such third person, and no evidence is subsequently given connecting the defendant with such transaction, and the case is submitted to the jury in an aspect to which the evidence so given has no relevancy, and there is conflict of evidence as to those facts which are relevant to the aspects in which the case was put to the jury, the fact that such evidence may have injuriously affected the defendant in its effect on the jury, as tending to excite sympathy for one side and animosity to the defendant, calls for a new trial; *a fortiori*, when the wrong as to which the evidence is given is of a character entirely different from the conspiracy alleged in the complaint. *Am. Natl. Bk. v. Wheelock*, 205.
7. Although the case is put to the

- jury in an aspect on which the evidence has no possible bearing, yet if it is calculated to prejudice the jury against the party as against whom it was received and against whom the jury found, on a conflict of evidence as to the facts which do bear on the case in the aspect in which it was put to the jury, its effect is not obviated by the manner of the submission, and a new trial is necessary. *Ib.*
8. Where, under a complaint, a case may be submitted in several aspects, and is so submitted, a verdict for plaintiff will be set aside and a new trial ordered, if there are errors against defendant in the charge as to one of the aspects. *Kingsbury v. Garden*, 224.
9. The reversal of an order of a trial judge, setting aside a verdict as against the weight of evidence, by an appellate court is a matter of grave importance. Such motions are not governed by any well defined rules, but depend, in a great degree, upon the peculiar circumstances of each case. They are addressed to the sound discretion of the judge or court, and whether they should be granted or refused involves the inquiry and consideration, in each case, as to whether substantial justice has been done or not. The decision is one particularly for the judge before whom the trial was had and who heard the testimony and saw the witnesses on the stand; and where the decision has been reached after full deliberation and judicial discretion, it should be confirmed. *Bannon v. McGrane*, 517.
10. A submission of the question to the jury was not called for, inasmuch as the preponderance of evidence in favor of the defendant, upon the point in controversy, was such that a verdict against them could not be sustained. *Whitworth v. Erie R. Co.*, 603.
11. On the trial the defendant requested the court to charge, as affecting the question whether there was a hiring for a year, that the jury should look at all "the probabilities of the case, and in so doing consider the absence of any protest on the part of the plaintiff, when he was discharged." The court so instructed, adding: "You will also consider that that was not made a point of by the defendants at the time." *Held*, that the addition did not constitute error; if it was fair to look at plaintiff's failure to insist on his rights under the contract, as he claimed it was, it was equally fair to consider the defendant's attitude, by silence or otherwise. *De Leon v. Echeverria*, 610.
- Decision of judge at trial term on motion for postponement on account of absence of witness, where exception is taken, reviewable by general term.* See *Gullaude v. Steinmetz*, 239.
- Effect of exception to refusal of judge to permit case to go to jury, no request being made.* See *Hammond v. Schultze*, 611.
- See APPEAL, 6; CLAIM AND DELIVERY.
- TRUSTS AND TRUSTEES.
1. Demand in an action for an unlawful conversion by the trustee of property held in trust is not affected by bankrupt discharge. *Hennequin v. Clews*, 108.
2. Where a note was drawn payable on demand, and indorsed over and delivered to the defendant, who thereupon executed and delivered a receipt for the same, whereby he acknowledged that the note had been so indorsed and delivered to him "to hold the same and the proceeds thereof, to secure, indemnify and save harmless the plaintiff for being sureties for

the payees of the note, &c.,"—*Held*, that the defendant occupied a trust relation towards the plaintiffs and the payee of the note; the extent of his trust, however, being limited by the terms of the receipt and the resolution of the directors of the payee of the note. He was bound or under a duty, to hold that note, and its proceeds, if paid to him, for the benefit of plaintiffs. As there was testimony in the case tending to show that he did not hold the note in his possession and under his control continuously, and also that he considered and stated that the note had been paid. *Held*, that the dismissal of the complaint by the court below, without any explanation of these acts and statements of defendant, that seemed to be in violation of his duty as trustee, was erroneous, for the plaintiffs had established a cause of action. *Morris v. Welch*, 305;

3. The declaration in question herein was substantially that the premises conveyed to the grantee were held by him, in trust, to sell for the benefit of the grantor's creditors, and out of the proceeds, First to pay to the grantor's wife certain sums in lieu of dower. "Second, to pay such liens and incumbrances upon the premises sold as are not assumed by the buyers thereof." Third, to pay, &c., grantor's creditors generally, &c. Upon consideration of the scope and intent of the above declaration, it was *Held*, 1. That the second subdivision thereof is to be construed as meaning that the liens must be paid out of the net proceeds of the lands upon which they exist, and not out of the net proceeds of other land sold under the trust. 2. That the subdivision must mean a payment of liens out of proceeds of a sale made by the trustee under the trust. Sale under mortgage

foreclosure is not such a sale. 3. That such a sale was referred to as would permit an assumption of the incumbrance, rather than one made by virtue of the incumbrance, and which merged or canceled it, so far as the buyer was concerned. Sale under mortgage foreclosure is not such a sale. *Lea v. Fabbri*, 361.

Assignee in bankruptcy a trustee of an express trust, under Code, § 317. See *More v. Durr*, 154.

See RECEIVERS; BANKS, &c., 4-7.

UNDERTAKINGS.

1. When, on an appeal from a judgment of the district court, the appellant gives the undertakings required by sections 354 and 356 of the Code, in one instrument, which is duly approved by a justice of said court, and files it with the clerk of the court of common pleas, it is a sufficient compliance with the statute to operate as a stay upon the judgment appealed from. *Ennis v. Broderick*, 92.
2. By the undertaking upon which this action is brought (which was the same as the one above described) the defendants undertook that if the judgment should be affirmed on appeal, and execution issued thereon be returned unsatisfied, they would pay the amount unsatisfied. *Held*, to make a *prima facie* case under the pleading, plaintiff was only bound to show that the judgment had been affirmed, and that execution issued thereon had been returned unsatisfied. *Id.*
3. By filing of a transcript of the judgment referred to in said undertaking in the office of the clerk of the city and county of New York, it thereupon became a judgment of the court of common pleas, for all purposes of enforcing satisfaction. If the formal requirement in the execution issued thereafter upon the same, directing the sheriff

to return said execution to the clerk of the city and county of New York was erroneous, which, however, is not clear under the new Code, and was a mere informality which may be disregarded, and which cannot be taken advantage of by defendants herein. *Ib.*

4. Chapter 481 of the Laws of 1862 does not apply to the case at bar. It provides a cumulative remedy against marshals and their surties, by suit on their official bonds. *Ib.*

See SURETIES.

USURY.

The employment of an agent to effect a loan does not impliedly or apparently authorize him to do an illegal act, and where a lender has received a security providing for the repayment of the precise amount loaned by him, with legal interest, the fact that the agent, without the authority, knowledge or participation of the lender, extorted from the borrower a bonus does not taint the transaction with usury. *Sniffen v. Koechling*, 61.

VENDOR'S LIEN.

MORTGAGE, 4, 9.

WAIVER.

When party deemed to waive right to ask reduction of security on appeal. See *Jessup v. Carnegie*, 310.

When omission to point out objection to court on former trial, deemed a waiver thereof for purposes of motion for new trial. See *Phyfe v. Masterson*, 338.

Lien of mortgage, agreement to waive, effect of same, and of record thereof. See *Bk. for Sav's. v. Frank*, 404.

See PARTIES, 4.

WAREHOUSEMEN.

1. Warehousemen must maintain that degree of care over the property intrusted to their care, that

men of prudence would exercise under like circumstances in regard to their own property. *Madan v. Covert*, 245.

2. Are not liable for a return, or for the value of the goods, where the same have been stolen from their possession, without negligence on their part. Theft of the goods may be proven by the proof of facts and circumstances that reasonably establish the conclusion that the goods were stolen. *Ib.*

3. Where the theft of the goods has been established or proven, the burden of proof rests upon the owner of the goods, to establish that the loss or the theft was owing to the negligence or want of care of the warehousemen in respect of the same. *Ib.*

4. Where the testimony as to the negligence of the warehousemen is conflicting, it is the province of the jury and not of the judge to determine, whether or not the loss or theft was occasioned by negligence or want of care on the part of the warehousemen. *Ib.*

5. Warehouseman has no right to demand of a mortgagee (not his bailee), who finds the mortgaged goods in his possession, an indemnity against an adverse claim as a condition of delivery. *Banfield v. Haeger*, 428.

6. Remedy of warehouseman in case of conflicting claims is to commence a suit in the nature of an interpleader. *Ib.*

WITNESS.

See EVIDENCE, 3.

WRIT OF INQUIRY.

When judgment entered after granting motion for writ of inquiry, not final judgment for purpose of appeal. See *Cameron v. Eq. Life Ass. Soc.*, 628.

YORKVILLE SAVINGS BANK.

See BANKS AND BANKING, 4-7.

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